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In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, when a district court has held an Act of Congress unconstitutional in a case to which an officer of the United States is a party, an appeal challenging the relief ordered by the district court must be taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, even though the appellant does not seek review of the district court's constitutional holding.

PARTIES TO THE PROCEEDING

Respondents are members of a class defined by the district court as follows (App. C, *infra*, 4a):

> All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411(a)(5)(A).

By subsequent order, the district court confined the class to those persons who received a final decision by the Secretary denying or reducing benefits on this basis after August 20, 1980 (App. E, *infra*, 14a).

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No.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals dismissing the government's appeal (App. A, *infra*, 1a) is not reported. The May 22, 1981 order of the district court granting summary judgment to respondents as to liability and class certification (App. C, *infra*, 3a-4a), the January 22, 1982 opinion of the district court regarding relief (App. D, *infra*, 5a-12a), and the March 19, 1982 order of the district court amending the January 22, 1982 opinion (App. E, *infra*, 13a-15a) are not reported.

JURISDICTION

The order of the court of appeals dismissing the government's appeal was entered on July 27, 1982 (App. B,

infra, 2a). On October 19, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

1. Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. 411(a)(5)(A), provides that in computing self-employment earnings for purposes of social security coverage, if any income derived from a trade or business is community income under the community property laws of the state, all of the gross income and deductions shall be attributable to the husband unless his wife exercises substantially all of the management and control of the trade or business. In the latter event, all of the gross income and deductions are treated as those of the wife.

During 1980, several courts held that this provision unconstitutionally discriminates on the basis of gender by creating a presumption that husbands are to be credited with all community income from a trade or business. In each case, the court remanded to the Secretary for a determination of the wife's earnings without regard to the presumption in Section 211(a)(5)(A). *Hester* v. *Harris*, 631 F.2d 53, 55-56 (5th Cir. 1980); *Carrasco* v. *Secretary of HEW*, 628 F.2d 624, 627-631 (1st Cir. 1980); *Becker* v. *Harris*, 493 F. Supp. 991, 994-995, 997 (E.D. Cal. 1980). In connection with its remand order, the Fifth Circuit in *Hester* concluded that the Secretary should, in the first instance, develop new methods and standards governing a claimant's entitlement to benefits under the Act in the context of a small family business, noting that "there must be thousands and thousands" of such cases in community property states. 631 F.2d at 56-57. The First Circuit, in *Carrasco*, likewise suggested that the Secretary should formulate a "new plan" for crediting such community income. 628 F.2d at 631. See also *Becker* v. *Harris*, *supra*, 493 F. Supp. at 996.

By letters dated September 20, 1980, the Attorney General formally notified the Speaker of the House of Representatives and the President of the Senate that the Solicitor General had determined that the government would not appeal the district court's decision in *Becker* holding Section 211(a)(5)(A) unconstitutional and that the Attorney General had concluded that the gender-based classification in Section 211(a)(5)(A) could not be defended under the standards announced by this Court in *Califano* v. *Westcott*, 443 U.S. 76 (1979), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).[1] See 126

[1] Under Section 21(a)(2) of the Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1049, the Attorney General was required to transmit a report to each House of Congress in any case in

Cong. Rec. H 10562 (daily ed. Nov. 12, 1980). This action constituted a formal acquiescence by the Executive Branch in the view that Section 211(a)(5)(A) is unconstitutional.[2]

2. On October 20, 1980, respondent Edwards filed this action in the United States District Court for the Northern District of California challenging the constitutionality of Section 211(a)(5)(A). The government informed the district court that it would not defend the constitutionality of the statute and requested the court to remand Edwards' case to the Secretary to allow him to determine how self-employment income should be allocated in community property states, as the courts had done in *Becker*, *Hester* and *Carrasco* (App. D, *infra*, 6a n.2). By order dated May 22, 1981, the district court denied the motion to remand to the Secretary, granted Edwards' motion for summary judgment on the issue of liability, and certified a requested class of all applicants for and recipients of Old Age, Survivors, and Disability Insurance benefits in community property states who were affected by the operation of Section 211(a)(5)(A) (App. C, *infra*, 4a).

On January 22, 1982, the district court issued an opinion resolving various questions regarding relief (App. D, *infra*, 5a-12a). The district court rejected the Secretary's proposal to allocate self-employment income to class members in the same gender-neutral manner in which such income is allocated between spouses in non-

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which he determined that the Department of Justice would refrain from defending any provision of law because of the position of the Department of Justice that the provision was unconstitutional. See also 2 U.S.C. (Supp. V) 288k(b). *Becker* was the first case in which the Solicitor General had to decide whether a direct appeal would be taken from a decision holding Section 211(a)(5)(A) unconstitutional.

[2] The Social Security Administration subsequently published a ruling acquiescing in the decision in *Becker*. See Social Security Ruling No. 81-17c, at 40 (Cum. Ed. 1981).

community property states. The court explained that under the Department's interpretation of Section 211(a), self-employment income can be derived only from partnerships or sole proprietorships. Thus, in non-community property states, if a married claimant cannot establish that a trade or business was carried on in a partnership with the other spouse, a determination is made as to which spouse was the sole proprietor and all income is then allocated to that spouse's account (App. D, *infra*, 6a). The court found this approach "inappropriate" in community property states because of its view that the factual determination of which spouse was the sole proprietor would be more difficult. The court also asserted, without elaboration or citation to supporting evidence, that "[a] strong possibility exists that such a sex-neutral standard would result in practice in an unstated sexually discriminatory presumption" (*id.* at 6a-7a).

In addition, the district court stated that it was "not persuaded" by the Secretary's interpretation of Section 211(a) as limiting self-employment income to that derived from a partnership or sole proprietorship, explaining that in its view the language of Section 211(a) "does not preclude the possibility of a co-proprietorship, where the business does not meet the partnership requirements but nevertheless employed both spouses" (App. D, *infra*, 7a). The court concluded that such "co-proprietor income" should be allocated between the spouses' earnings accounts according to the relative amount of labor contributed by each (*ibid.*, citing *Rasmussen* v. *Gardner*, 374 F.2d 589, 594 (10th Cir. 1967)).[3]

[3] The Social Security Act does not recognize as covered employment an individual's work in a business in which his spouse is the sole proprietor, because of the potential for fraud or abuse in allocating income resulting from a family business. See 42 U.S.C. 410(a)(3)(A); *Carrasco* v. *Secretary of HEW*, *supra*,

The district court ordered that its new rule for the allocation of self-employment income between spouses in community property states be applied to class members retroactively to the inception of the coverage of self-employment in 1950 (App. D, *infra*, 7a-10a). In so ordering, the court rejected the government's contention that, under this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971),[4] the elimination of the presumption in Section 211(a)(5)(A) in favor of husbands should be applied only to income derived after October 1980, the date of the government's acquiescence in the decision in *Becker* (App. D, *infra*, 7a). In weighing the equities under *Chevron Oil*, the court recognized as a "serious problem" the possibility that retroactive reallocation of income could reduce some husbands' quarters of coverage so as to make them ineligible for benefits or reduce their income and that some wives might be better off with their share of their husbands' income than with their own. Rather than declining to order retroactive relief on this ground, however, the court ordered that no current recipient shall have his benefits reduced as a result of its decision and that wives who would benefit more from the former system could elect to remain under it (App. D, *infra*, 9a-10a). The court also held that its order of retroactive relief would not be limited by 42 U.S.C. (& Supp. IV) 405(c)(1)(B) and 405(c)(4), which generally restrict to three years, three months, and fifteen days the period within which in-

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628 F.2d at 629. Nevertheless, under the district court's order, an individual's work in a business fully managed and controlled by his spouse will be deemed self-employment of a "co-proprietor" in community property states.

[4] See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 37-38 (plurality opinion).

come entries in the Secretary's records may be corrected (App. D, *infra*, 10a-11a).[5]

3. The Secretary filed a notice of appeal to the court of appeals on March 31, 1982 (App. G, *infra*, 17a). In its Docketing Statement, filed on May 5, 1982, the government stated that it had conceded the unconstitutionality of Section 211(a)(5)(A) and that the remaining issues concerned solely the relief to be granted. In the itemization in the Docketing Statement of the issues to be raised on appeal, the government listed only matters concerning relief; there was no mention of the constitutional issue.[6]

On June 2, 1982, respondents filed a motion to dismiss the government's appeal, contending that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291. Respondents argued that the government had a right to take a direct appeal to this Court under 28 U.S.C. 1252, which provides for such an appeal from a judgment or order holding an Act of Congress unconstitutional in a civil action to which the United States or an agency or officer thereof is a party, even though the government sought review only of the district court's decision on non-constitutional issues. Accordingly, respondents maintained that the court of appeals did not have jurisdiction of the case under 28

[5] The court's January 22, 1982, opinion, as modified by an order of March 19, 1982, requires that notice of the decision be sent to all female class members residing in community property jurisdictions who were denied benefits after August 20, 1980 (App. D, *infra*, 11a; App. E, *infra*, 14a). Respondent Edwards' individual case was remanded to the Secretary for further proceedings under the standards announced in the court's decision (*id.* at 13a). Final judgment was entered against the Secretary on March 23, 1982 (App. F, *infra*, 16a).

[6] The Docketing Statement is attached as Exhibit G to the Brief in Support of Plaintiffs-Appellees' Motion to Dismiss the Appeal for Lack of Jurisdiction, No. 82-4156, filed in the court of appeals.

U.S.C. 1291, which does not apply "where direct review may be had in the Supreme Court." See *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389, 391 (1982).[7]

By order dated July 27, 1982, the court of appeals granted respondents' motion to dismiss the appeal for lack of jurisdiction, citing only 28 U.S.C. 1252 and *Donovan* v. *Richland County Association for Retarded Citizens*, *supra* (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question concerning the scope of this Court's appellate jurisdiction under 28 U.S.C. 1252. The court below concluded that an appeal in a case in which a federal district court has held an Act of Congress unconstitutional must be taken directly to this Court under Section 1252 rather than to the court of appeals under 28 U.S.C. 1291, even though the appellant does not seek review of the district court's constitutional holding. This decision is inconsistent with the text of Section 1252, which in its second paragraph plainly contemplates that an appeal raising only non-constitutional issues may be taken to the court of appeals.

The decision below also disregards the legislative history of Section 1252 and the decisions of this Court construing that section, which make clear that the direct appeal procedure was intended to provide for an expeditious and authoritative resolution only of disputed questions of the constitutionality of an Act of Congress. This purpose has no application here, where the unconstitutionality of the statutory provision is conceded and will not be in issue on appeal. The effect of the court of appeals' decision is to expand the scope of this Court's mandatory appellate jurisdiction by shift-

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[7] See Brief, *supra* note 6, at 4-5, 7-8.

ing to this Court a category of appeals raising nonconstitutional issues that would more appropriately be heard in the first instance by the courts of appeals. Such a decision by a court of appeals concerning the appellate jurisdiction of this Court especially warrants review by this Court.

Review also is warranted because the court of appeals' order dismissing the Secretary's appeal leaves standing and unreviewable the decision of the district court on relief, which will bind the Secretary in all community property jurisdictions. That decision is erroneous in a number of critical respects; it conflicts with decisions of the First and Fifth Circuits on questions of relief in this precise setting; and it will have significantly adverse practical consequences in the administration of the Social Security program.

1. The first paragraph of 28 U.S.C. 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, * * * is a party." Under the concluding phrase of 28 U.S.C. 1291, a court of appeals does not have jurisdiction of an appeal from a final decision of a district court under that Section "where direct review may be had in the Supreme Court." *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, 454 U.S. at 391. In this case, the court of appeals held that it did not have jurisdiction of the government's appeal under 28 U.S.C. 1291 because direct review could have been had in the Supreme Court under 28 U.S.C. 1252. This conclusion is inconsistent with the language, legislative history, and purposes of Section 1252.

a. The text of the first paragraph of Section 1252, just quoted, itself indicates that the existence of a con-

stitutional issue on appeal is a necessary prerequisite for a direct appeal to this Court. Direct appeal lies "from" a judgment or order holding an Act of Congress unconstitutional, thereby directly linking the right of appeal to the holding of unconstitutionality. In the instant case, in contrast, the government will not challenge the district court's holding of unconstitutionality, and that holding will remain in effect even if the government prevails on its appeal. Nothing on the face of the first paragraph of 28 U.S.C. 1252 suggests that Congress intended to bring such an appeal under a procedure that was manifestly intended for resolution of constitutional issues.

In addition, because a direct appeal lies under Section 1252 whether the order appealed from is "interlocutory or final," a direct appeal may be taken to this Court from an order declaring a statute unconstitutional that was issued before the district court had an opportunity to consider questions of relief. If the Court were to affirm an interlocutory order holding an Act of Congress unconstitutional and remand to the district court for further proceedings only on questions of relief, it could not seriously be contended that any subsequent appeal from the district court's order granting relief must again be taken directly to this Court under 28 U.S.C. 1252. The relevant "holding" on the constitutional issue would have been the decision of this Court on the prior appeal, not any subsequent reiteration by the district court of that holding. Thus, it seems plain from the text of the first paragraph of Section 1252 that Congress did not intend that questions of relief must be reviewed in the first instance by this Court in every case in which an Act of Congress has been held unconstitutional, even where the constitutional holding itself is no longer in issue. The result should be no different

in the instant case, where the district court's constitutional holding likewise is not in issue on appeal.[8]

b. If there were any remaining doubt on the question, the second paragraph of 28 U.S.C. 1252 makes clear that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court. The second paragraph of Section 1252 provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

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[8] This construction of the first paragraph of 28 U.S.C. 1252 is supported by reference to the prior provision for direct appeal from a district court to the Supreme Court. In the Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 *et seq.*, Congress created the circuit courts of appeals (Section 2, 26 Stat. 826) and conferred on them jurisdiction to review final decisions of the district courts (Section 6, 26 Stat. 828), except where direct review was available in this Court under Section 5 (26 Stat. 827). The latter Section provided for direct appeals to this Court from the district courts, inter alia:

> In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States * * * is drawn into question.

Thus, Section 5 appears rather clearly to have provided for direct review by this Court only where the constitutional issue actually would be addressed on appeal. This provision was reenacted in the Judicial Code of 1911, Act of Mar. 3, 1911, ch. 231, Section 238, 36 Stat. 1157, and remained in effect until 1925 (see 28 U.S.C. (1925 ed.) 345), when it was eliminated by a statute narrowing this Court's mandatory jurisdiction. Act of Feb. 13, 1925, ch. 229, Section 238, 43 Stat. 938. There is no indication that Congress intended to confer a broader right of direct appeal, to embrace appeals on non-constitutional issues as well, when it restored the direct appeal mechanism in 1937 for cases involving the constitutionality of federal statutes.

The first sentence of this paragraph establishes that all appeals or cross appeals in a case in which an Act of Congress has been held unconstitutional must be taken to this Court only *after* a party has filed a notice of appeal pursuant to the first paragraph of Section 1252. The necessary corollary to this rule is that prior to or in the absence of such notice, other appeals may be taken to the court of appeals.

Moreover, the second sentence just quoted provides that all appeals taken to "other courts" prior to the filing of the notice of appeal to this Court pursuant to the first paragraph of Section 1252 "shall be treated as taken directly to the Supreme Court"; such appeals to other courts are not regarded as jurisdictionally defective because they were not taken directly to this Court in the first instance. It necessarily follows that if a notice of appeal to this Court pursuant to the first paragraph of Section 1252 is not filed, appeals taken to "other courts"—in this case, to the court of appeals—likewise are not jurisdictionally defective. Cf. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4037, at 53 (1978).

Thus, the first and second paragraphs of 28 U.S.C. 1252 together divide appeals in cases in which a district court has held an Act of Congress unconstitutional into two categories: those that must be taken directly to this Court, and those for which the generally applicable right of appeal to the court of appeals pursuant to 28 U.S.C. 1291 is preserved. It is evident from the text and structure of 28 U.S.C. 1252 that the basis for distinguishing between the two categories must be whether the appeal itself presents the question of the constitutionality of an Act of Congress to which the first paragraph explicitly refers.[9]

[9] This Court's jurisdiction under 28 U.S.C. 1252 therefore does not depend on whether the constitutional question was contested in the court that held the Act of Congress unconstitu-

When a direct appeal is taken to this Court, the Court of course has jurisdiction to decide "not only the constitutional question, but the whole case" (*Williams* v. *Zbaraz*, 448 U.S. 358, 368 n.10 (1980), quoting *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975)), including non-constitutional questions such as those concerning the relief to be granted if the holding of unconstitutionality is affirmed.[10] But where the appellant does not seek review of the holding of unconstitutionality, an appeal does not lie under 28 U.S.C. 1252 on any issue.[11] An appeal from other aspects of the district

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tional, but rather on whether this Court is asked to review the constitutional holding. See Reply Brief for the Appellant in response to the Motions to Dismiss in *INS* v. *Chadha*, No. 80-1832 (1980 Term), at 3-10. Such cases of course include those in which the appellant challenges the district court's interpretation of the Act of Congress that in turn led the court to hold the Act unconstitutional. See, *e.g.*, *Donovan* v. *Blitz*, appeal pending, No. 82-611. In such a case, if this Court adopts the appellant's statutory construction, it will reverse the holding of unconstitutionality.

[10] The provision in the second paragraph of Section 1252 for all other appeals and cross-appeals to be taken directly to this Court also ensures that there will not be duplicative proceedings in the court of appeals and this Court on these nonconstitutional questions. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

[11] For this reason, the United States has moved to dismiss the appeals in *Process Gas Consumers Group* v. *Consumer Energy Council of America*, No. 81-2008, and *Petrochemical Energy Group* v. *Consumer Energy Council of America*, No. 81-2151. Those appeals seek review of certain aspects of the District of Columbia Circuit's decision in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (1982), appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151 81-2171, 82-177 and 82-209, in which the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. V) 3342(c). The appeals in Nos. 81-2008 and 81-2151 do not seek review of the court of appeals' holding that the legislative veto

court's decision therefore must be taken to the court of appeals unless another party has taken a direct appeal to this Court on the constitutional question. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

c. The legislative history of 28 U.S.C. 1252 strongly supports the conclusion that the direct appeal mechanism is available only when the constitutional holding will be subject to review and reversal on appeal. The direct appeal provision in 28 U.S.C. 1252 was first enacted as Section 2 of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 752. The House, Senate and Conference Reports on that measure all described the bill as one providing, in pertinent part, for "appeal by the United States in certain cases in which the constitutionality of acts of Congress is involved" (H.R. Rep. No. 212, 75th Cong., 1st Sess. 1 (1937); S. Rep. No. 963, 75th Cong., 1st Sess. 1 (1937); H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. 5 (1937)). In addition, the House Report explained that the purpose of the provision was to ensure a "prompt determination by the court of last resort of *disputed questions of the constitutionality of acts of the Congress*" (H.R. Rep. No. 212 *supra*, at 2;

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provision is unconstitutional, and they therefore cannot be brought pursuant to the first paragraph of 28 U.S.C. 1252. Moreover, because the decision was rendered by a court of appeals, not a district court, the appellants in those cases have no other right to take an appeal on the non-constitutional questions that can be transferred to this Court pursuant to the second paragraph of Section 1252. Review of the other questions presented therefore may be obtained only pursuant to this Court's discretionary certiorari jurisdiction under 28 U.S.C. 1254(1). See Memorandum for the United States in *Process Gas Consumers Group, et al.* v. *Consumer Energy Council of America, et al.*, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209 (filed Sep. 9, 1982), at 20-21 & n.8. See also the United States' Motion to Dismiss the cross-appeal in *Beneficial Finance of Kansas, Inc.* v. *United States*, cross-appeal pending, No. 81-583 (filed Nov. 25, 1981), at 5-6.

emphasis added). The government's appeal in the instant case "involve[s]" no such "disputed question[]" of the constitutionality of Section 211(a)(5)(A) of the Social Security Act; the government has conceded the unconstitutionality of that provision and seeks review only of other issues. The Senate Report similarly refers to the power of the Attorney General "to take a question of constitutionality to the Supreme Court" (S. Rep. No. 963, *supra*, at 2).

The floor debates also demonstrate that the direct appeal mechanism was intended for resolution of the constitutional question. Thus, Representative Sumners, Chairman of the House Judiciary Committee and sponsor of the bill, explained that the Attorney General should be granted "the right to appeal directly to the Supreme Court from an adverse decision *on the question of constitutionality*" (81 Cong. Rec. 3254 (1937); emphasis added) "in order to expedite the determination of the constitutional question" (*id.* at 3272).[12] This, he explained, would "shut[] off a long period of suspense for the litigants in other cases" if the "determination is against the constitutionality of the act" (*id.* at 3256). Similarly, Representative Chandler explained that passage of the measure was necessary because, although Congress had passed numerous laws, it had "not expedited the determination of their constitutionality when the lowest courts declare them invalid" (*id.* at 3273).

Representative Sumners was asked whether, when the Attorney General intervened in a suit between pri-

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[12] See also 81 Cong. Rec. 3261 (1937) (remarks of Rep. Sumners; emphasis added):

> When the question of the constitutionality of an act of Congress is raised, and it is a serious question, it is the judgment of the members of the committee that *that question* ought to be presented to the Supreme Court just as quickly as it can be carried there properly.

vate parties involving the constitutionality of an Act of Congress and took an appeal directly to the Supreme Court following the district court's holding of unconstitutionality, "this take the entire case directly to the Supreme Court * * * or just the question of constitutionality?" 81 Cong. Rec. 3260 (1937) (remarks of Rep. McFarlane). Representative Sumners did not respond directly to this question, although this Court of course has since held that a direct appeal brings up the "whole case." See, *e.g.*, *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 368. But Representative Sumners did stress in his answer that the case "would come up on the question of constitutionality." 81 Cong. Rec. 3260 (1937).

Another Member inquired further regarding the other issues that could be involved in the case (*id.* at 3261 (remarks of Rep. Dowell)):

> Assuming that litigants have other questions involved and that on the other question an appeal is taken from the district court. Assume further the Attorney General intervenes on a constitutional question. How would the litigant proceed in the court of appeals so far as their appeal is concerned?

The Committee's recommended bill did not contain a provision similar to that now embodied in the second paragraph of 28 U.S.C. 1252, providing for a transfer of such appeals to this Court (see 81 Cong. Rec. 3269 (1937)), and Representative Sumners therefore responded that he did not know what arrangement would be made for cases in which separate appeals were taken to the court of appeals and the Supreme Court (*id.* at 3261). The bill passed by the Senate responded to this concern by adopting a provision for other appeals in the case to be taken to this Court as well, but only if a direct appeal has first been taken to this Court under what is now the first paragraph of Section 1252. See S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937). Section 2 of the law as enacted contained this provision.

50 Stat. 752.[13] Thus, where, as here, a direct appeal has not been taken to this Court from the district court's holding of unconstitutionality, the right of appeal to the court of appeals on other issues was preserved.

The legislative history therefore leaves no doubt that Congress enacted what is now 28 U.S.C. 1252 for the purpose of making a direct appeal available in those situations in which the question of the constitutionality of an Act of Congress would actually be presented to this Court, and that Congress understood that appeals raising other issues would continue to be taken to the court of appeals. There is no indication that Congress intended to permit a direct appeal where the appellant seeks review only of non-constitutional issues and where the decision on appeal therefore would not affect the district court's holding of unconstitutionality.

d. The opinions of this Court construing 28 U.S.C. 1252 offer no support for the decision of the court of appeals in this case. Those opinions make clear that the purpose of Section 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a

[13] The House bill provided for direct appeal only by the Attorney General, not other parties to the case. 81 Cong. Rec. 3269-3270, 3272-3273 (1937). It was thus clear that under the House bill, appeals by other parties on non-constitutional questions (as well as the constitutional issue) would have been taken to the court of appeals. The Senate bill, and the law as enacted, made the right of direct appeal available to any party, not merely the United States, yet at the same time inserted the provision now contained in the second paragraph of 28 U.S.C. 1252, which expressly contemplates that certain appeals may continue to be taken to the court of appeals. S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937); 50 Stat. 752. Nothing in the language or legislative history suggests that the preservation of a right of appeal to the court of appeals in certain situations does not apply to the government as well as other parties.

holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975); see also *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, 454 U.S. at 390–391 n.3. Because, in these circumstances, the Executive will be required to adhere to the holding of unconstitutionality and to disregard the contrary provisions of a duly enacted law, Congress determined that a due regard for the role of the Legislative Branch and the need to remove a cloud from the administration of the statute in question warranted a prompt and definitive resolution by the only Court capable of providing it. *McLucas* v. *DeChamplain*, *supra*; *Fleming* v. *Rhodes*, 331 U.S. 100, 104 & n.6 (1947); *Reid* v. *Covert*, 351 U.S. 487, 490 (1956), vacated on other grounds, 354 U.S. 1 (1957); 81 Cong. Rec. 3254-3255, 3268-3269 (1937) (remarks of Rep. Sumners).

These policies simply have no application where, as here, the Attorney General has acquiesced in the district court's constitutional holding because the unconstitutionality of the statutory provision is, in his view, dictated by prior decisions of this Court. The decision not to appeal the holding of unconstitutionality in such a case necessarily carries with it a determination by the Executive to adhere to the lower court's holding in the nationwide administration of the law. To require the government nevertheless to take an appeal directly to this Court only on questions of relief therefore would not serve the purposes underlying Section 1252, because the holding of unconstitutionality would not be affected by the outcome of the appeal. And, at the same time, such a requirement would add a new category of cases to this Court's mandatory appellate docket at a time when the burden on this Court is increasing in other respects. The decision of a court of appeals that bears so directly on this Court's jurisdiction should be reviewed by this Court.

The only authority the court of appeals cited in its order dismissing the appeal was this Court's decision last Term in *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*. See App. A, *infra*, 1a. But that decision obviously has no application here. There, the Secretary of Labor did challenge the district court's holding of unconstitutionality, and the Secretary's appeal therefore had to be taken to this Court. Nothing in *Richland County* suggests that an appeal that does not present the constitutional question must be brought directly to this Court as well. This Court should correct the court of appeals' obvious misapprehension of the ruling in *Richland County*.

2. Review also is warranted in this case because the effect of the court of appeals' dismissal of the appeal is to leave standing and unreviewable by any court an erroneous district court decision on relief that will bind the Secretary in the administration of the Social Security Act in all community property jurisdictions.[14] The district court's decision ordering the Secretary to recognize a judicially fashioned concept of a "co-proprietorship" that has no basis in the Act itself (see page 5, and note 3, *supra*) directly conflicts with the decision of the Fifth Circuit in *Hester* v. *Harris*, *supra*, 631 F.2d at 56, which expressly declined to order that approach after holding Section 211(a)(5)(A) unconstitutional. The refusal by the district court to remand the case to the Secretary to allow him, in the first instance, to formulate a plan for the allocation of income between spouses in community property jurisdictions also squarely conflicts with the decisions of the First and Fifth Circuits in *Carrasco* v. *Secretary of HEW*, *supra*, and *Hester*

[14] Respondents did not move to dismiss the Secretary's appeal to the court of appeals until June 2, 1982, three days after the Secretary's time in which to file a jurisdictional statement docketing the appeal in this Court had expired. See 28 U.S.C. 2101(a).

v. *Harris*, *supra*, and with that of the district court in *Becker* v. *Harris*, *supra*. Such judicial usurpation of the Secretary's responsibility for administering the Social Security Act should not be permitted to go unreviewed.

In addition, the district court's order requiring that records be corrected for members of the class retroactive to the beginning of the self-employment program in 1950, if necessary, will impose substantial burdens on the Social Security program. And the court's order that no husband's benefits may be reduced even if his wife or former wife is paid benefits calculated on the basis of earnings that are reallocated from the husband's account will result in the unauthorized payment of duplicative benefits and an unwarranted drain on the Social Security Trust Fund. An opportunity for at least one level of appellate review should be afforded for a decision having these adverse consequences.[15]

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[15] If the Court concludes that an appeal should have been taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, it is respectfully submitted that the appropriate disposition would be for the Court to grant the petition, vacate the judgment below, and remand to the district court with instructions to enter a new judgment from which a direct appeal to this Court could be taken. See *Query* v. *United States*, 316 U.S. 486, 490-491 (1942); see also *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972); *Phillips* v. *United States*, 312 U.S. 246, 254 (1941); 28 U.S.C. 2106. In *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, the Court declined to order this relief because the government was challenging a holding striking down the statute in question but had failed to follow the "clear commands" of 28 U.S.C. 1252 that such an appeal be taken directly to this Court. Here, in contrast, it surely cannot be said that there is a "clear command" in 28 U.S.C. 1252 that the government take a direct appeal solely on a question of relief. *Phillips* v. *United States*, *supra*, 312 U.S. at 254. Moreover, while *Richland County* involved the ap-

3. Although the jurisdictional question presented is important and warrants review by this Court, we do not believe that plenary consideration is necessary to correct the manifest error of the court of appeals. We therefore have set forth the argument on the jurisdictional issue in detail at this stage in the event that the Court should agree that summary disposition is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Respectfully submitted.

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NOVEMBER 1982

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plication of an Act of Congress in only one factual situation, the decision of the district court in this case will bind the Secretary in the application of the Social Security Act to numerous claimants in all community property jurisdictions.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82–4156

DC# CV 80–3959 MHP
Northern California

Filed July 27, 1982

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

ORDER

Before: TANG and FERGUSON, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted. *See* 28 U.S.C. § 1252, *Donovan v. Richland County Association*, 102 S.Ct. 713 (1982).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82–4156

DC CV 80–3959 MHP

Filed August 19, 1982

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DEFENDANT-APPELLANT.

APPEAL from the United States District Court for the Northern District of California.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal is dismissed for lack of jurisdiction.

Filed and entered July 27, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

Civil Action No. C–80–3959 MHP

Filed May 22, 1981

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF,

vs.

RICHARD SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DEFENDANT

ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AS TO LIABILITY AND CLASS CERTIFICATION AND DENYING DEFENDANT'S MOTION FOR REMAND

This matter having come on for consideration of Defendant's Motion for Remand of the individual plaintiff's case and for consideration of Plaintiff's Motions for Summary Judgment on the issue of defendant's liability and for Certification of a Plaintiff Class, and the Court, after the submission of briefs on the above motions and after hearing oral argument on the same, being fully advised in the premises, it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Defendant's Motion for Remand of the individual Plaintiff's case is denied;

2. Plaintiff's Motion for Summary Judgment on the issue of Defendant's liability is granted;

3. This Court having found that Plaintiffs have met the requirements of Federal Rules of Civil Procedure 23(a) and b(2), Plaintiff's Motion for Certification of the following class is granted:

All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C. § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411(a)(5)(A).

4. Counsel for Plaintiffs and Defendants are hereby instructed to work to resolve the issue of the time limits to be placed upon membership in the Plaintiff class and the issue of the methods of notice to class members. Counsel are to report their progress at a status conference to be held by this Court on July 13, 1981 at 9:30 A.M.

DATED: MAY 22 1981

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C–80–3959

MILDRED M. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

MEMORANDUM DECISION AND ORDER

Filed Jan. 22, 1982

Plaintiffs challenged the constitutionality of 42 U.S.C. § 411(a)(5)(A),[1] which governs the treatment of self-employment income in community property states. A class was certified of

> All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C. § 401 et seq., on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411(a)(5)(A).

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[1] Hereinafter all references to section numbers are from 42 U.S.C.

The class was further limited to members who received a final decision from the Secretary of Health and Human Services within 60 days of the filing of the action.

Section 411(a)(5)(A) was found to violate the due process clause of the fifth amendment because it unlawfully discriminated against women on the basis of sex.[2] The issue now before the court is what relief is to be afforded class members who were adversely affected by the operation of the statute.

SCOPE OF RELIEF

Defendant proposes to treat plaintiff class members as the agency now treats non-community property claimants.[3] Under agency interpretation of § 411(a), self-employment income can be derived only from partnerships or sole proprietorships. If claimants cannot meet the partnership criteria, a determination is made as to which spouse is the sole proprietor. All income is then allocated to that spouse's account. Defendant argues that this is a sex-neutral standard.

The court finds this solution inappropriate. First, community property claimants differ significantly from

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[2] Defendant essentially conceded the unconstitutionality of § 411(a)(5)(A), due to earlier court decisions. *Hester* v. *Harris*, 631 F.2d 53 (5th Cir. 1980); *Carrasco* v. *Secretary of Health, Education and Welfare*, 628 F.2d 624 (1st Cir. 1980); *Becker* v. *Harris*, 493 F.Supp. 991 (E.D. Cal. 1980). Despite those decisions, the agency had continued to apply the challenged section. This court therefore rejected a request by defendant that the case be remanded for consideration, finding that the case-by-case challenge, agency acquiescence, and remand was inappropriate for disposing of these cases. Therefore, plaintiff's motion for class certification was granted.

[3] Defendant has argued that plaintiffs do not have standing to attack the application of the remainder of § 411(a), since it has never been applied to them. This argument has no merit. Standing concerns whether the court has initial jurisdiction to hear a suit. It does not pertain to the later stage of relief.

other claimants in that each spouse owns fifty percent of the business property. This is likely to make the factual determination of who was sole proprietor much more difficult. A strong possibility exists that such a sex-neutral standard would result in practice in an unstated sexually discriminatory presumption. Second, the court is not persuaded by the agency interpretation of the statute. Section 411(a) discusses partnerships and individuals, not sole proprietorships. This does not preclude the possibility of co-proprietorship, where the business does not meet the partnership requirements but nevertheless employed both spouses. *Rasmussen* v. *Gardner*, 374 F.2d 589, 594 (10th Cir. 1967).

Plaintiffs are entitled to an allocation of such co-proprietor income between the spouses' earnings accounts. Such a resolution was suggested in *Hester* v. *Harris*, 631 F.2d 53, 56 (5th Cir. 1980). The basis for the division should be the relative amount of labor contributed by each. *See Rasmussen* v. *Gardner*, 374 F.2d at 594.

RETROACTIVITY

Defendant proposes that elimination of the presumption in favor of husbands under § 411(a)(5)(A) be applied only to income derived after October 1980. This is when the decision to acquiesce in *Becker* v. *Harris*, 493 F.Supp. 991 (E.D. Cal. 1980), became final. Plaintiffs object, arguing that such a limit essentially nullifies any relief.

Retroactive application of a judicial decision is the norm. "The concept stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been." *Cash* v. *Califano*, 621 F.2d 626, 628 (4th Cir. 1980). Nevertheless, in recognition that retroactivity sometimes causes inequities, the Supreme Court developed a test for determining when prospec-

tive-only application is appropriate. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). "However, *Huson* considers the retroactive effect of a separate decision, rather than the scope of relief to be afforded in the case before a court." *Shannon* v. *United States Civil Service Commission*, 444 F.Supp. 354, 369 (N.D. Cal. 1977), *modified on other grounds*, 621 F.2d 1030 (9th Cir. 1980). Like *Shannon*, this case involves the relief to be afforded the plaintiff class herein, since this court decided liability. Therefore, the *Huson* factors need not be applied in determining that relief should be retroactive beyond the October 1980 date.

Even if the *Huson* test is used, retroactivity is still appropriate. *Huson* provides a three-part test. First, the decision which is to be applied prospectively must establish a new principle of law, not "clearly foreshadowed" by earlier precedent. Second, prospective application must further the purpose of the rule. Third, the equities must weigh against retroactivity. *Chevron Oil* v. *Huson*, 404 U.S. at 106-07. All three prongs of the test must be satisfied for prospective only application, and the party arguing against retroactivity bears the burden of persuasion. *See Cash* v. *Califano*, 621 F.2d at 629.

The first factor weighs in favor of retroactivity. There was a substantial likelihood that § 411(a)(5)(A) would be struck down on gender discrimination grounds. Given the strong line of gender discrimination cases decided by the Supreme Court in the last decade,

> the most the Secretary could have hoped for was a halt in a very clear trend. None of the nonretroactivity cases have turned on so tenuous a proposition. Instead those cases have either involved a complete reversal of prior law, [citation omitted], or a pronouncement upon a case of first impression [citation omitted].

Cash v. *Califano*, 621 F.2d at 630. This case fits neither of those categories.

The second factor to be considered is whether prospective application would further the purpose of the rule. The Ninth Circuit has read § 411(a) to favor coverage. "The premise of the system ... is that all gainfully employed persons are to be covered, except as specifically excluded." *Delno* v. *Celebrezze*, 347 F.2d 158, 162 (9th Cir. 1965) (footnote omitted). The purpose of broad coverage favors retroactivity.

The third factor is a weighing of the equities.[4] Defendant argues that several hardships weigh against retroactivity: administrative burden, increased claims on the fund, and adverse effects on individual claimants. Administrative burden cannot rise to the level of "substantial inequitable results," *Chevron Oil* v. *Huson*, 404 U.S. at 107. If it did, it could be raised in almost every case where a statute is found unconstitutional. The depletion-of-the-fund argument has not been supported by any evidence. Mere assertions are insufficient. *See Hurvich* v. *Califano*, 457 F.Supp. 760, 764 (N.D. Cal. 1978).

The most serious problem in weighing the equities is possible adverse effects on individuals. Defendant argues that reallocation of income may reduce some males' quarters of coverage so as to make them ineligible or reduce their benefits. Defendant also conjectures that some women may be better off with their share of their husbands' accounts than with their own. These difficulties can be avoided, however. This court has the power to fashion a remedy that would "minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979). This court finds it appropriate to order that, despite any recompu-

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[4] Even if the equities weighed in favor of prospective application, retroactivity would still be required since the first two prongs of the *Huson* test have not been met. *See Cash* v. *Califano*, 621 F.2d 626, 629 (4th Cir. 1980).

tation, no current recipient shall have his benefits reduced. Also, the agency is to allow women who would benefit more from the former system to elect to remain under the original allocation.

Application of the *Huson* test to this case demonstrates that retroactive application of the decision in this case is proper. Therefore, plaintiff class members are entitled to a recomputation of their earnings records, extending back to the beginning of Social Security if necessary. There is no justification for cutting off retroactivity at any prior point.[5]

STATUTORY TIME LIMITATIONS

The Secretary contends that plaintiffs are bound by § 405(c)(4) and (5) time limitations on changing entries in employment records. Section 405(c)(4) sets a time limit of three years, three months, and fifteen days within which income entries may be corrected. After that time, the records become conclusive evidence of the account or existence of self-employment income, § 405(c)(4)(C), unless one of the specific exceptions in § 405(c)(5) is met.

The Secretary cannot use the statutory time limitations to preclude recomputations where the statute has been found unconstitutional. This court has the authority to provide plaintiffs with effective relief.

In addition, plaintiff class members fall into one of the exemptions from the limit, § 405(c)(5)(G).[6] That

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[5] This court is aware that retroactivity in a sex discrimination case has been limited to the date of decision in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), as "the case in which the new principle of law was first enunciated." *Cash* v. *Califano*, 469 F.Supp. 129, 135 (W.D. Va. 1979), *aff'd*, 621 F.2d 626 (4th Cir. 1980). This court finds such limitation inappropriate. The announcement of a new principle of law is relevant to whether retroactivity is appropriate, not to the period of retroactivity.

[6] It has been suggested that § 405(c)(5)(G) applies only when the entire earned amount is being shifted to another account.

section allows the Secretary "to correct errors made in the allocation ... [of] self-employment income." Therefore, the agency is not to restrict class members' requests for reallocation to the three year, three month, and fifteen day period.[7]

AMENDMENT OF REGULATIONS

Plaintiffs have requested that defendant be ordered to adopt regulations that conform with this court's ruling. Plaintiffs also request that any proposed regulatory amendments be subject to review by this court prior to publication. Such an order would be inappropriate. It is expected, of course, that any regulations adopted by the agency will be consistent with the several holdings of this court and other courts that have found § 411(a)(5)(A) unconstitutional. Plaintiffs retain the right to challenge any rule-making by following normal procedures.

NOTICE TO CLASS MEMBERS

The defendant is ordered to send individual notices of rights under this decision to female class members residing in community property jurisdictions who were denied benefits between August 20, 1980 and April 14, 1981. Defendant estimates that such notice will cost approximately $70,629.00.[8] This court finds that this is not an unreasonable amount, given the importance of the rights involved. Also, defendant was given the op-

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There is no basis for such a narrow reading of the statute. At least one court has applied that exception to a division of earnings between co-proprietors. *See Bocian* v. *Matthews*, 411 F. Supp. 1200 (N.D. Iowa 1976).

[7] It should be emphasized that even if the earnings are reallocated, this is not to adversely affect the benefits of any current recipient.

[8] A slightly higher figure was suggested by defendants at the hearing but that amount did not exceed $90,000.

portunity to correct its application of § 411(a) after the decision in *Carrasco* v. *Secretary of Health, Education and Welfare*, 628 F.2d 624 (1st Cir. June 11, 1980), and failed to do so. Plaintiffs are to submit a proposed notice that conforms with this and the preceding order of December 17, 1981. Defendant will then have twenty days in which to file objections.

CONCLUSION

Plaintiff class members are entitled to recomputation of their earnings records through an allocation of coproprietor income. Each spouse's earnings record should be credited with income proportionate to their labor in the business. The recomputation should extend to any relevant income without time limitations. Notice to class members is to be provided as outlined above.

IT IS SO ORDERED.

January 22, 1982.

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-80-3959 MHP

MILDRED M. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

vs.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

Filed March 19, 1982

On January 22, 1982 this court issued a Memorandum Decision and Order which disposed of the substantive issues in this case. During a telephone conference with all parties on March 10, 1982 it became apparent that some procedural issues had to be resolved before an appealable final order could issue. The procedural problems are the status of Ms. Edwards' individual case, the extent of the class, the proper recipients of individual notices, and the contents of said notices.

First, Ms. Edwards' case is remanded to the Secretary for further proceedings consistent with the decisions of this court. Such proceedings should include a recomputation of her earnings records through an allocation of the income from the co-proprietorship (if the Secretary determines that a co-proprietorship existed), the allocation to be based on the relative labor contributions to the business of claimant and her spouse.

Second, there is some confusion concerning the extent of the class. On May 18, 1981 the court defined the class without reference to time limitations. On August

14, 1981 the class definition was modified for purposes of relief to include "those members who received a 'final decision' from the Secretary within 60 days prior to the filing of this lawsuit." That 60-day limitation was designed to preclude persons who might seek reopening of their case after the statutory period in 42 U.S.C. § 405(g) had run. The August 14 order was intended only to clarify the beginning point of the class for relief purposes. The class includes all persons who received a final decision from the Secretary within 60 days prior to the filing of this lawsuit, or at any time thereafter.

Third, the order of January 22, 1982 must be amended insofar as it describes those class members who are to receive individual notices. That order required that notice be sent to those class members "who were denied benefits between August 20, 1980 and April 14, 1981." The closing date of April 14 was chosen on the presumption that the Social Security Administration had ceased to enforce 42 U.S.C. § 411(a)(5)(A) as of that date. However, it has become apparent that § 411(a)(5)(A) continued to have some effect. Defendant did not retroactively recompute earnings records established while § 411(a)(5)(A) was in effect. Defendant also applied § 411(a) to co-proprietorships in community property states, which this court has found inappropriate. Therefore, any denial or reduction of benefits which is caused by the application of standards relative to §§ 411(a) or 411(a)(5)(A) not in accord with those standards contained in the January 22 order of this court are deemed to be decisions under § 411(a)(5)(A). Defendant is required to send an individual notice of rights under the decisions of this court to any class member so denied after April 14, 1981. This is in addition to the notices required by the January 22 order. Defendant is also required, as of the date of this order, to maintain a record of women in community property

states whose benefits are reduced or denied by virtue of the effect of § 411(a)(5)(A).

Finally, this court will issue shortly an order containing the language approved for the individual notices required by this order and that of January 22.

IT IS SO ORDERED.

Date: 19 March 1982.

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

vs.

RICHARD SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

NO. C-80-3959 MHP

FILED MARCH 23, 1982

JUDGMENT

Fed. R. Civ. P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge, presiding, and the issues having been duly presented and orders having been duly filed herein,

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is granted and plaintiff Edwards' claim is remanded to the defendant Secretary for proceedings consistent with this court's orders.

Dated: 23 March 1982.

/s/ MARILYN HALL PATEL

United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

MILDRED M. EDWARDS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

CIVIL ACTION NO. C-80-3959 MHP

FILED MARCH 31, 1982

NOTICE OF APPEAL

NOTICE is hereby given that the defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on March 23, 1982.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

By:/s/ JUDITH A. WHETSTINE
Assistant United States Attorney

/s/ LEWIS K. WISE

/s/ VICTORIA L. BLEIBERG

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ORIGINAL

RECEIVED
JAN 27 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AT., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases	Pages
California v. Grace Brethren Church, ___U.S.___, 102 S.Ct. 2498 (1982)	3, 4, 8
Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982)	2, 5, 7, 8
Fleming v. Rhodes, 331 U.S. 100 (1947)	3, 6
Genty v. United States, 212 Ct.Cl. 27, 546 F.2d 343 (1976), reh. den. 212 Ct.Cl. 27, 551 F.2d 852 (1977)	4
McLucas v. DeChamplain, 421 U.S. 21 (1975)	5, 6, 7, 8
Secretary of the Navy v. Avrech, 418 U.S. 676 (1974)	6
United States v. Clark, 445 U.S. 23 (1980)	3, 4, 8
United States v. Raines, 362 U.S. 26 (1960)	6
Williams v. Zbaraz, 448 U.S. 358 (1980)	6, 7, 8

Statutes	
42 U.S.C. § 411(a)(5)(A)	2
50 Stat. 752	3

Miscellaneous	
81 Cong.Rec. (1937)	
p. 3272	5
p. 8514	6
12 Moores Federal Practice §411.11	2

No. 82-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL., RESPONDENTS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Mildred M. Edwards and all persons similiarly situated, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Ninth Circuit in this case. The orders and decisions of the district court below, and the Ninth Cicuit are found in the Appendix attached to the Petition herein.

QUESTION PRESENTED

Petitioner has improperly stated the question presented. Petitioner's question actually begs the issue, for it assumes that the government's notice of appeal filed in the district court sought only partial appeal of this case. Respondents suggest the following is a more appropriate statement of the question presented:

> Whether, when a district court has held an Act of Congress unconstitutional in a case where an officer of the United States is a party, an appeal must always be taken directly to this Court under 28 U.S.C. §1252, rather than the Court of Appeals under 28 U.S.C. §1291.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner's argument is premised on the contention that petitioner has appealed only the relief portions of the district court's judgment. The record, however, belies that assumption.

The district court held, as the government now acknowledges, that Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. §411(a)(5)(A), "violate[s] the due process clause of the Fifth Amendment because it unlawfully discriminated against women on the basis of sex." Memorandum Decision and Order, January 22, 1982, Appendix D to Petition, at 6a (footnote omitted). In response to that judgment, which also sets forth the manner in which petitioner was to determine benefits for class members, petitioner filed a simple Notice of Appeal. See Appendix G to Petition, at 17a.

Petitioner's notice of appeal states unambigously that he is appealing from "the final judgment" of the district court which, as petitioner concedes, included a holding that the statute at issue was unconstitutional. Consequently, this case fits squarely within the confines of 28 U.S.C. §1252,[1/] and is removed from the jurisdiction of the Court of Appeals under 28 U.S.C. §1291. Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982).

Petitioner seeks to remove himself from the ambit of §1252 by claiming that he has acquiesced in the unconstitutionality of the statute, and no longer wishes to pursue that issue.

[1/] There are four pre-requesites to §1252. First, the judgment below must be by an appropriate court of the United States. Second, the court must hold an Act of Congress unconstitutional. Third, the case must be a civil proceeding. Fourth, the United States or an officer thereof must be a party. 12 Moores Federal Practice, §411.11. All four pre-requisites are met in this case.

The Secretary's agreement that the statute was unconstitutional, however, did not fully resolve the merits of the case. In its January 22, 1982 decision, the Court below stated:

> "Defendant [Secretary] essentially conceded the unconstitutionality of §411(a)(5)(A) due to earlier court decisions. Hester v. Harris, 631 F.2d 53 (5th Cir. 1980); Carrasco v. Secretary of Health, Education and Welfare, 628 F.2d 624 (1st Cir. 1980); Becker v. Harris, 493 F.Supp. 991 (E.D.Cal. 1980). Despite those decisions the agency had continued to apply the challenged section." Memorandum Decision and Order, January 22, 1982, Appendix D to Petition, at 6a n.2 (emphasis supplied).

The question of the application of an unconstitutional statute to the respondent class was at the heart of the district court's decision.[2/] The relief aspects of the lower court's judgment were intertwined with and premised upon the unconstitutional ruling. As long as the "determination that a statutory provision was unconstitutonal 'was a necessary predicate to relief'", §1252 provides jurisdiction in this court for appellate review. California v. Grace Brethren Church, ___U.S.___, 102 S.Ct. 2498, 2506 (1982), quoting United States v. Clark, 445 U.S. 23, 26 n.2 (1980).

[2/] This court has long held that it maintains appellate jurisdiction under §1252 "when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance ... rather than upon the challenged statute as a whole." Fleming v. Rhodes, 331 U.S. 100, 102-103 (1947) (discussing predecessor to §1252, Act of Aug. 24, 1937, 50 Stat. 752). See also, e.g., California v. Grace Brethren Church, ___U.S.___, 102 S.Ct. 2498, 2506 (1982).

Indeed, this Court in Grace Brethren Church, at 2506 n.16, noted that the lower court developments in Clark were virtually identical to those in this action. The only issue before the Court of Claims in Clark was relief to the plaintiffs, as the government had conceded that the unconstitutionality of the underlying statute had already been resolved in Gentry v. United States, 212 Ct.Cl. 27, 546 F.2d 343 (1976), rehearing denied 212 Ct.Cl. 27, 551 F.2d 852 (1977).

This Court held in Clark that for purposes of determining whether it had jurisdiction under §1252, it was "irrelevant" that the constitutionality of the statute was previously determined in another case, and concluded that the case fit squarely with §1252, even though the only issues considered by the court below related to relief. United States v. Clark, at 26 n.2. Thus, the fact that relief to the respondent class was petitioner's central focus in this action does not remove this case from §1252.

2. Petitioner has also premised his restrictive interpretation of §1252 on the laudable policy of seeking to minimize this court's mandatory appellate jurisdiction. However, this Court confirmed only last term that Congress explicitly intended that §1252 be "an unambigous exception to the policy of minimizing the mandatory docket of this Court." California v. Grace Brethren Church, at 2506.

Petitioner's arguments suggest a

> "gloss on §1252 [that] perhaps would be 'consonant with the overriding policy, historically encouraged by Congress of minimizing the mandatory docket of ... [the Supreme Court] ....' Gonzales v. Automatic Employees Credit Union, supra, 419 U.S. at 98, 95 S.Ct. at 294. We

> think, however, that in §1252 Congress unambigously mandated an exception to this policy in the narrow circumstances that the section identifies. The purpose of §1252 is too plain to allow circumvention, whatever doubts may be entertained about the wisdom of mandatory direct review in other circumstances." McLucas v. DeChamplain, 421 U.S. 21, 31 (1975). See also Donovan v. Richland County Association for Retarded Citizens, supra.

The legislative history of §1252 certainly supports this conclusion. As petitioner noted, "the direct appeal provision of §1252 was first enacted as section 2 of the Act of Aug. 24, 1937, Ch. 754, 50 Stat. 752." Petition, at 14. The Congressional debates in 1937, contrary to petitioner's assertions, reflect the desire to broaden the appellate review of the Supreme Court. In essence, Congress intended to remove a specific class of cases from the normal appellate process and place them quickly and completely before this Court. Thus, Representative Summers, Chairman of the Judiciary Committee and sponsor of the bill, summed up the effect of the act as follows:

> "It gives the right of appeal directly to the Supreme Court in cases where the right to appeal would now be to the Circuit Court of Appeals." 81 Cong.Record 3272 (1937).

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This policy was confirmed when the Senate added what is now the second paragraph of §1252 to the bill.[3/] The intent of this provision was to insure that all aspects of the case, including other possible appeals, were brought to the Supreme Court under §1252. Fleming v. Rhodes, 331 U.S. 100 (1947); United States v. Raines, 362 U.S. 26, 27 n.7 (1960); McLucas v. DeChamplain, supra, at 31; and Williams v. Zbaraz, 448 U.S. 358, 368 n. 10 (1980).

Rather than implying that there are ways to appeal portions of an action covered by §1252 to the Court of Appeals, the second paragraph merely demonstrates Congress' desire to insure that §1252 would be all-encompassing. By using language that covers all conceivable appeals filed both before and after a §1252 appeal, Congress emphasized that "§1252 brings before ...[the Supreme Court] not only constitutional questions but the whole case." McLucas v. DeChamplain, supra, at 31.

The results in McLucas illustrate this concept. Despite the fact that the underlying constitutional issue in McLucas has been resolved by this Court in Secretary of the Navy v. Avrech, 418 U.S. 676 (1974), Justice Powell, writing for the majority, held that the Supreme Court not only had jurisdiction to determine the propriety of requiring a three-judge court below, but also could resolve a separate issue of access to records which was "independent" of the

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[3/] Consequently, it is impossible for the House debates to be used to suggest the congressional intent behind the second paragraph of §1252. That portion was inserted by the Senate after the House debates, and there was little discussion by the Senate of its effect. See 81 Cong.Rec. 8514

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constitutional questions. McLucas, supra, at 33-34.[4/]

The "unambigous" intent of §1252 is to provide Supreme Court appellate review of all matters that the lower court passed upon while holding an Act of Congress unconstitutional. Since the present case falls within those guidelines, petitioner could have appealed the district court's rulings even as to relief to this Court under §1252; therefore, the Ninth Circuit was deprived of its jurisdiction under §1291. Donovan v. Richland County Association for Retarded Citizens, supra.

3. The ruling of the Ninth Circuit does not leave an important district court decision unreviewable. The Court of Appeals below merely held that the proper avenue of appeal in this case was not the Circuit Court, but the Supreme Court under §1252. The statutory scheme set up by Congress insured not only some review of the lower court, but prompt attention by the highest court in the land.

The only reason there will be no appellate review in this case is the "government's simple failure in this case to follow the clear commands of 28 U.S.C. §1252 and 28 U.S.C. §1291." Donovan, supra, at 714.[5/] The results of denying

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[4/] Similiarly, in Williams v. Zbaraz, supra, this Court took jurisdiction not only over the constitutional issue, but also over a statutory issue which had been resolved by the Court of Appeals even before the constitutional issue was inserted into the case.

[5/] The Secretary's mistake was that he simply failed to file a timely notice of appeal to this Court under §1252. The Secretary could easily have protected his position by following the government's practice in McLucas of filing two notices of appeal, one to this Court under §1252, and one to the Court of Appeals under §1291.

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the petitition for certiorari are no more harsh than in Donovan, where the district court's holding the statute unconstitutional was finalized even though the government maintained that the law was valid.[6/]

It is therefore respectfully submitted that the Secretary's petition for writ of certiorari should be denied.

DATED: January 24, 1983

Respectfully submitted,

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By _____
NEAL S. DUDOVITZ
Attorneys for Respondents

[6/] Since the ruling of the Court of Appeals below is consistant with a long line of recent decisions from this Court (e.g., McLucas, Clark, Ebaraz, Donovan, and Grace Brethren Church), it does not warrant this Court granting the petition for writ of certiorari. Petitioner's suggestion that this case is proper for summary disposition is equally in error. Given the rulings of this Court only last term in Donovan and Grace Brethren Church, any consideration of reversing the Ninth Circuit in this matter suggests a possible departure from precedent which demands plenary consideration.

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SUPREME COURT, U.S.

No. 82-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL., RESPONDENTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, MILDRED M. EDWARDS, request leave of this court to file their opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in forma pauperis pursuant to Rule 46.

In support of this motion, Respondent is filing the accompanying affidavit of her counsel NEAL S. DUDOVITZ demonstrating that the district court below, United States District Court for the Northern District of California, has previously held that respondent is entitled to proceed in this matter in forma pauperis and meets the requirements of 28 USC §1915. Since the petitioner herein was the appellant in the United States Court of Appeals for the Ninth Circuit no subsequent in forma pauperis orders were required in this matter.

DATED: January 24, 1983

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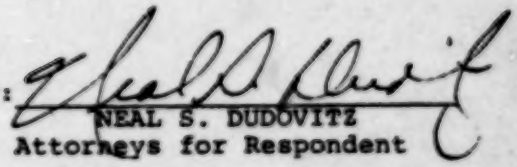
By: 
NEAL S. DUDOVITZ
Attorneys for Respondent

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v.

MILDRED M. EDWARDS, ET AL., RESPONDENTS

AFFIDAVIT OF NEAL S. DUDOVITZ IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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1. I, NEAL S. DUDOVITZ, am a member of the Bar of the United States Supreme Court and of the Bar of the state of California. I have also been counsel of record in the above-referenced matter since it was first filed in October, 1980.

2. When this case was filed in the United States District Court for the Northern District of California, respondent sought to proceed in the matter in forma pauperis. Attached hereto as Exhibits "A" and "B" respectively are respondent's application to proceed in forma pauperis as well as our copies of respondent's affidavit in support of her application to proceed in forma pauperis.

3. Pursuant to this application, the district judge below granted the request to proceed in forma pauperis and issued an order on October 21, 1980 requiring the clerk of the district court to issue a summons without payment of filing fees and to have the complaint and summons served without cost by the United States Marshall. A copy of the district court's order of October 21, 1980, is attached hereto as Exhibit "C".

1/

4. The order of the Court of October 21, 1980, was the standard order issued by the United States District Court for the Northern District of California when granting a request to proceed in forma pauperis. I have confirmed this by a telephone conversation with the clerk's office of the Northern District of California on January 21, 1983. During that conversation, I was also informed that the Northern District has only this past week revised its form order so that the order will now specifically note that the application for in forma pauperis is being granted.

5. Since respondent prevailed in the district court, as appellee in the United States Court of Appeals for the Nint Circuit there were no fees or expenses required; thus, no application to proceed in forma pauperis was needed.

6. At all stages of this case, therefore, respondent has been permitted to proceed in forma pauperis, and has been found to meet the requirements of 28 U.S.C. §1915.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 24th day of January, 1983, at Los Angeles, California.

NEAL S. DUDOVITZ

Subscribed and sworn to before me this 24th day of January, 1983

Stephanie Barshefski
Notary Public in and for said County and State

OFFICIAL SEAL
STEPHANIE BARSHEFSKI
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires AUG 17, 1985

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Stephen R. Nielson, Esq.
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Attorneys for Plaintiffs

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OCT 20 1980

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 80 3959 CBR

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS, both individually and on behalf of all others similarly situated, Plaintiff, vs. PATRICIA R. HARRIS, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. APPLICATION TO PROCEED IN FORMA PAUPERIS

MILDRED M. EDWARDS, plaintiff herein, through her attorneys, pursuant to 28 U.S.C. §1915 and for the reasons set forth in her attached affidavit, respectfully requests that she be permitted

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EXHIBIT A

to proceed in this action In Forma Pauperis.

Dated: October 17, 1980

REDWOOD LEGAL ASSISTANCE
NATIONAL SENIOR CITIZENS LAW CENTER
NATIONAL PARALEGAL INSTITUTE

Attorneys for Plaintiffs

By Barbara A. Midtbo
BARBARA A. MIDTBO, Esq.

EXHIBIT A

REDWOOD LEGAL ASSISTANCE
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Attorneys for Plaintiffs

ORIGINAL
FILED

OCT 20 1980

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 80 3959 MHP

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS, both individually and on behalf of all others similarly situated, Plaintiffs, vs. PATRICIA R. HARRIS, Secretary of the Department of Health and Human Services, Defendant.	Civil Action No. IN FORMA PAUPERIS AFFIDAVIT

I, MILDRED M. EDWARDS, say:

1. I am the named plaintiff in this action, a resident of Trinidad, California and a citizen of the United States.

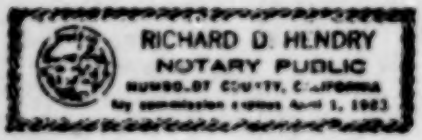
2. I am not able to pay fees and costs necessary to commence the above-entitled action without impairing my ability to obtain

EXHIBIT B

NOTARIAL ACKNOWLEDGMENT

STATE OF CALIFORNIA)
) ss
COUNTY OF HUMBOLDT)

On October 17, 1980, before me, the undersigned, a Notary Public for the State of California, personally appeared MILDRED M. EDWARDS known to me to be the person who subscribed her name to the foregoing document and acknowledged to me that she executed the same.



Richard D. Hendry
Notary Public for the State of California

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EXHIBIT B

the common necessities of life; nor am I able to give security therefor.

3. My present financial position is as follows:

MONTHLY INCOME

Social Security Retirement - LeRoy Edwards	$220.00
Wife's Benefits - Mildred Edwards	96.00
Rental Income	500.00
	$816.00

Number of persons dependent upon such income: Two

MONTHLY EXPENSES

Real Property Taxes, Insurance, and Maintenance (Residence and Rental Property on One Parcel)	$200.00
Utilities for Residence	125.00
Transportation	120.00
Food and Clothing	250.00
Medical Insurance and Expenses	100.00
Incidentals and Emergencies	21.00
	$816.00

4. The above-entitled action seeks review of an administrative decision of defendant denying my claim for Retirement Insurance Benefits under Title II of the Social Security Act.

5. I believe that I am entitled to the redress prayed for in the attached complaint.

WHEREFORE, I pray that this Court grant me leave to prosecute said action without being required to prepay costs or fees or give security therefor.

DATED: October 17, 1980.

Mildred M. Edwards

MILDRED M. EDWARDS, Affiant.

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///

EXHIBIT B

FILED
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RICHARD W. WIEKING
CLERK
U.S. DIST CT COURT
DIST OF CA

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MILDRED M. EDWARDS,

Plaintiff
(Petitioner)

vs.

PATRICIA R. HARRIS

Defendant
(Respondent)

Civil No. C 80-3959 MHP

ORDER PERMITTING ISSUANCE OF PROCESS

IT IS ORDERED that the Clerk issue summons in the above entitled action.

IT IS FURTHER ORDERED that the U.S. Marshal, for the Northern District of California, serve, without prepayment of fees, a copy of the complaint, petitioner's affidavit and this order upon the defendant.

DATED: OCT 21 1980

UNITED STATES DISTRICT JUDGE

EXHIBIT C

USC-CSA 7 8-80

Office-Supreme Court, U.S.
FILED
FEB 16 1983
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In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents cite in their brief in opposition a number of decisions of this Court involving direct appeals taken pursuant to 28 U.S.C. 1252. What respondents fail to point out, however, is that in *every* case they mention, the party who invoked this Court's jurisdiction under Section 1252 sought review of the lower court's constitutional holding. See *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 1, 10-13, 24-25; *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982); *Williams* v. *Zbaraz*, 448 U.S. 358, 366 (1980);[1] *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980);[2] *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975);[3] *United*

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[1]See 79-4 J.S. 7; 79-5 J.S. 6, 16; 79-491 J.S. 2 (1979 Term).

[2]See 78-1513 J.S. 2 (1978 Term).

[3]See 73-1346 J.S. 2 (1973 Term).

States v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-104, 106-107 (1947). A direct appeal to this Court obviously lies in those circumstances; indeed, Section 1252 was intended for precisely such cases. None of the decisions respondents cite addresses the quite different question, involved in this case, of whether an appeal must be taken directly to this Court even when the appeal raises only issues other than the constitutionality of an Act of Congress.[4]

Respondents nevertheless contend (Br. in Opp. 4) that this Court's decision in *United States* v. *Clark*, *supra*, supports their position. This contention is plainly wrong. In *Clark*, the appellee argued that an appeal did not lie under Section 1252 because the Court of Claims did not actually hold an Act of Congress unconstitutional—one of the explicit threshold requirements for taking an appeal under 28 U.S.C. 1252. Instead, it was argued, the government had conceded that a prior decision of the Court of Claims holding the same statute unconstitutional was dispositive.[5] This Court concluded, however, that a determination that the statutory provision was unconstitutional "was a necessary predicate to the relief" granted to the appellee's children and that "this determination of unconstitutionality may be appealed under § 1252" (445 U.S. at 26 n.2), even though the Court of Claims had reached its conclusion by relying

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[4]After the district court entered the judgment that is at issue here, it entered an order on December 1, 1982 awarding attorney's fees to respondents. In light of the court of appeals' dismissal of the appeal at issue here, the government, on January 3, 1983, filed a notice of direct appeal to this Court from the order awarding attorney's fees, to preserve the government's right of appeal under the Ninth Circuit's apparent view of 28 U.S.C. 1252 as requiring a direct appeal even on nonconstitutional issues. We cannot believe, however, that Congress intended such issues to be added to this Court's mandatory docket.

[5]78-1513 Mot. to Aff. 13 (1978 Term).

on its earlier ruling (*ibid.*). Thus, although the government had conceded in *Clark* that the case was controlled in the Court of Claims by a prior decision of that court, it did not concede that the statute was unconstitutional; to the contrary, it sought review of the constitutional holding in this Court. In the instant case, unlike in *Clark*, it is not the "determination of unconstitutionality" that the Secretary seeks to have reviewed (445 U.S. at 26 n.2), but other matters.[6]

Respondents' reliance (Br. in Opp. 3) on *California* v. *Grace Brethren Church, supra*, is misplaced for the same reason. Quoting a phrase from the opinion in that case out of context, respondents contend that as long as the "determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' " (slip op. 11, quoting *United States* v. *Clark, supra*, 445 U.S. at 26 n.2), a direct appeal lies to this Court under 28 U.S.C. 1252. As explained below, however, the question involved in *Grace Brethren Church*, like that in *Clark*, was whether the district court had actually decided the question of the constitutionality of an Act of Congress so that the appellants could in turn take a direct appeal for the purpose of presenting that same question to this Court.

Although the district court in *Grace Brethren Church* did not expressly hold the provision of the Federal Unemployment Tax Act (FUTA) unconstitutional (slip op. 11), it did hold the closely related state statute unconstitutional and

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[6]Respondents contend (Br. in Opp. 4) that *Clark* is similar to this case because there, as here, the only issues considered by the lower court related to relief. The relevant inquiry for purposes of 28 U.S.C. 1252, however, is not what issues the lower court actively "considered" (rather than regarded as conceded by a party or foreclosed by prior decisions), but whether this Court would be asked to pass on the constitutional question. If so, as in *Clark*, a direct appeal lies; if not, as here, a direct appeal does not lie. See Pet. 12-13 n.9.

enjoined the state officials from collecting taxes under it (*id.* at 8). This Court concluded that the district court's holding that the state statute was unconstitutional was based solely on the court's understanding of the FUTA (*id.* at 9-11). Accordingly, the Court held, in the passage quoted above and by respondents, that a determination that the FUTA was unconstitutional "was a necessary predicate to the relief" granted against the state officials and that an Act of Congress therefore had been held unconstitutional for purposes of 28 U.S.C. 1252. For this reason, the state and federal officials were free to take a direct appeal to challenge this constitutional holding. The Court did not suggest that a direct appeal would have been required if the state and federal officials had acquiesced in and therefore had not sought review of the district court's constitutional holding and the state officials had appealed only the relief ordered by the district court, as the Secretary did here.

2. Respondents also miss the significance of the second paragraph of 28 U.S.C. 1252, which, unlike the decisions upon which they rely, does address the matter of appeals to the court of appeals in cases in which an Act of Congress has been held unconstitutional.[7] Respondents contend (Br. in Opp. 6) that the intent of this paragraph is only to ensure that all aspects of a single case would be brought to this Court, consistent with the principle that an appeal under Section 1252 brings before the Court "not only the constitutional question, but the whole case." *McLucas* v. *DeChamplain, supra*, 421 U.S. at 31.

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[7]The second paragraph of Section 1252 provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

This explanation of the purpose of the second paragraph ignores the fact that, by the terms of the first sentence, it is only *after* a party receives a notice of direct appeal under Section 1252 that all other appeals and cross appeals in the case must be taken to this Court. Prior to or in the absence of a direct appeal pursuant to the first paragraph of Section 1252, the right to take other appeals to the court of appeals pursuant to 28 U.S.C. 1291 is preserved. Similarly, the second sentence of the second paragraph of Section 1252 provides that appeals to "other courts" prior to the notice of direct appeal "shall be treated as taken directly to ~~this~~ the Supreme Court"; such appeals are not deemed jurisdictionally defective because they were taken to the court of appeals in the first instance rather than directly to the Supreme Court. The second paragraph of Section 1252 thus makes clear that even in cases in which an Act of Congress has been held unconstitutional, appeals not challenging the holding of unconstitutionality must be taken to the court of appeals under Section 1291.[8]

3. Perhaps recognizing the flaws in their legal argument, respondents contend (Br. in Opp. 2) that in any event the record in this case shows that the Secretary appealed the entire judgment, including the constitutional holding, not just the relief ordered by the district court. In fact, the record shows just the opposite. As we explain in the certiorari petition (Pet. 7), on May 5, 1982—almost a month *before* respondents moved to dismiss the appeal—the government stated in its docketing statement filed in the court of appeals that it had conceded that Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. 411(a)(5)(A), is unconstitutional and that the only questions remaining and to be raised in the court of appeals

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[8]The legislative history supports this reading of the second paragraph. See Pet. 15-17.

concerned the relief ordered by the district court. This docketing statement was attached as Exhibit G to respondents' brief in support of their motion to dismiss the appeal in the court of appeals. Respondents therefore were well aware that the government was not challenging the constitutional holding on appeal.[9]

4. Respondents do not deny that the court of appeals' order dismissing the government's appeal leaves standing a district court order on relief that (i) is of substantial importance, (ii) binds the Secretary in the administration of the Social Security Act in all community property states, and (iii) conflicts with the decisions of two other courts of appeals and one district court that have considered these same question in the identical setting. See Pet. 19-20. Nor do respondents make any effort to defend the relief ordered by the district court, which, as we have explained (Pet. 19-20), is erroneous in a number of respects. Their only answer is that the Secretary, the Trust Fund and the public must live with this result because the government failed to follow what they term the "clear commands" of 28 U.S.C. 1252 that a direct appeal be taken (Br. in Opp. 7, quoting *Donovan* v. *Richland County Association for Retarded Citizens, supra*, 454 U.S. at 390). See also Pet. 19 n.14.

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[9]Respondents maintain (Br. in Opp. 3) that the government's concession in the district court that Section 211(a)(5)(A) is unconstitutional (in light of earlier decisions so holding) did not resolve the merits of this case because, quoting a footnote in the district court's opinion, even after those other judicial decisions, the Secretary "had continued to apply the challenged section" (see Pet. App. 6a n.2). It is irrelevant, however, that prior to the concession and judgment in this case, the Secretary had not acquiesced in the constitutional holdings of other courts and therefore may have continued to apply the Section administratively. In *this* case, a nationwide class action, the government did formally acquiesce in the conclusion that Section 211(a)(5)(A) is unconstitutional, after the Attorney General notified Congress that he would not defend the statute. See Pet. 3-4. This position obviously was intended to bind the Secretary in the future as against all claimants, and the government accordingly did not appeal the constitutional holding.

As we have explained, 28 U.S.C. 1252 in fact does not require that a direct appeal be taken in this case. But even if the Court in the end should disagree with our construction of Section 1252, at the very least it cannot be said that that Section contains a "clear command" that a direct appeal be taken in a case such as this, especially in view of the contrary indications in its second paragraph and respondents' inability to cite any precedent for the result they seek. Accordingly, if the Court does not reverse the court of appeals' order dismissing the appeal, it is respectfully submitted that the appropriate disposition would be for the Court, consistent with its practice in other cases in which the proper appellate procedure is not clearly established, to vacate the judgment below and remand to the district court with instructions to enter a new judgment from which a direct appeal could be taken to this Court. See, *e.g.*, *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972). See also Pet. 20 n.15.[10]

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[10]In *Donovan* v. *Richland County Association for Retarded Citizens, supra*, where the Court declined to follow this approach because of the "appellants' simple failure * * * to follow the clear commands of 28 U.S.C. § 1252 and 28 U.S.C. § 1291" (454 U.S. at 390-391; footnote omitted), the result was to leave standing a decision that applied only to one institution. Here, in contrast, the decision of the district court in this class action will bind the Secretary with respect to similarly situated claimants in all community property jurisdictions.

For the foregoing reasons and the additional reasons given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

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QUESTION PRESENTED

Whether, when a district court has held an Act of Congress unconstitutional in a case to which an officer of the United States is a party, an appeal challenging the relief ordered by the district court must be taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, even though the appellant does not seek review of the district court's constitutional holding.

PARTIES TO THE PROCEEDING

Respondents are members of the class defined by the district as follows (Pet. App. 4a):

> All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C. § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411 (a)(5)(A).

By subsequent order, the district court confined the class to those persons who received a final decision by the Secretary denying or reducing benefits on this basis after August 20, 1980 (Pet. App. 14a).

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OPINIONS BELOW

The order of the court of appeals dismissing the government's appeal (Pet. App. 1a) is not reported. The May 22, 1981 order of the district court granting summary judgment to respondents as to liability and class certification (Pet. App. 3a-4a), the January 22, 1982 opinion of the district court regarding relief (Pet. App. 5a-12a), and the March 19, 1982 order of the district court amending the January 22, 1982 opinion (Pet. App. 13a-15a) are not reported.

JURISDICTION

The order of the court of appeals dismissing the government's appeal was entered on July 27, 1982 (Pet. App. 2a). On October 19, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 24, 1982. The petition for a writ of certiorari was filed on that date and was granted on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the district court rested on 42 U.S.C. (Supp. V) 405(g).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

2. 28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States

District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

1. Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. (& Supp. V) 411(a)(5)(A), provides that in computing self-employment earnings for purposes of social security coverage, if any income derived from a trade or business (other than a trade or business carried on by a partnership) is community income under the community property laws applicable to the income, all of the gross income and deductions shall be attributed to the husband unless the wife exercises substantially all of the management and control of the trade or business. In the latter event, all of the gross income and deductions are treated as those of the wife.

During 1980, several courts held that this provision unconstitutionally discriminates on the basis of sex by creating a presumption that the husband is to be credited with all community income. In each case, the court remanded to the Secretary for a determination of the wife's earnings without regard to the presumption in Section 211(a)(5)(A). *Hester* v. *Harris*, 631 F.2d 53, 55-56 (5th Cir. 1980); *Carrasco* v. *Secretary of HEW*, 628 F.2d 624, 627-631 (1st Cir. 1980); *Becker* v. *Harris*, 493 F. Supp. 991, 994-995, 997 (E.D. Cal. 1980). In connection with its remand order in *Hester*, the Fifth Circuit concluded that the Secretary should, in the first instance, develop new methods and standards governing a claimant's entitlement to benefits under the Act in the context of a small family business. 631 F.2d at 56-57. The First

Circuit, in *Carrasco*, likewise suggested that the Secretary should formulate a "new plan" for crediting such community income. 628 F.2d at 631. See also *Becker* v. *Harris*, *supra*, 493 F. Supp. at 996.

By letters dated September 30, 1980, the Attorney General formally notified the Speaker of the House of Representatives and the President of the Senate that the Solicitor General had determined that the government would not take an appeal from the district court's decision in *Becker* holding Section 211(a)(5)(A) unconstitutional and that the Attorney General had concluded that the presumption in Section 211(a)(5)(A) could not be defended under the standards announced by this Court in *Califano* v. *Westcott*, 443 U.S. 76 (1979), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). See 126 Cong. Rec. H10562 (daily ed. Nov. 12, 1980).[1] This action constituted a formal acquiescence by the Executive Branch in the position that Section 211(a)(5)(A) of the Social Security Act is unconstitutional.[2]

2. On October 20, 1980, respondent Edwards filed this action in the United States District Court for the

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[1] Under Section 21(a)(2) of the Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1050, the Attorney General was required to transmit a report to each House of Congress in any case in which the Department of Justice declined to defend a federal statute because of the determination that the provision was unconstitutional. See also 2 U.S.C. (Supp. V) 288k(b). *Becker* was the first case in which the Solicitor General had to decide whether to take a direct appeal to this Court from a decision of a lower court holding Section 211(a)(5)(A) unconstitutional.

[2] The Social Security Administration subsequently published a ruling acquiescing in the decision in *Becker*. See Social Security Ruling No. 81-17c, at 40 (Cum. ed. 1979).

Northern District of California seeking judicial review under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g), of the final decision of the Secretary denying her application for retirement benefits. She alleged that she had taken over the operation of a rock and gem business from her husband after he began to receive Social Security retirement benefits in 1972 and that she thereafter operated the business with her husband's assistance because she is blind. Complaint ¶ 8.[3] Respondent further alleged that the Secretary denied her application for retirement benefits because she failed to demonstrate that she had exercised substantially all of the management and control of the business—which was located in California, a community property state—and that, by operation of Section 211(a)(5)(A), the income from the business therefore was attributed to her husband. As a result, she did not receive credit for self-employment income during this period and did not have sufficient quarters of coverage to be eligible for Social Security retirement benefits. Complaint ¶ 9(a).[4]

In accordance with the position formally adopted by the Attorney General and Solicitor General in con-

[3] The complaint is attached as Exhibit A to the Brief in Support of Plaintiff-Appellees' Motion to Dismiss the Appeal for Lack of Jurisdiction, No. 82-4156, filed by respondents in the court of appeals. This brief will be cited as "Resp. C.A. Br."

[4] The Social Security Act does not recognize as covered employment an individual's work in the employ of his spouse, because of the potential for fraud or abuse in allocating income resulting from a family business. See Section 210(a)(3)(A), 42 U.S.C. (& Supp. V) 410(a)(3)(A); *Carrasco* v. *Secretary of HEW*, *supra*, 628 F.2d at 629. Thus, respondent Edwards could not receive credit for any earnings as an employee of her husband in the business during this period.

nection with the district court decision in *Becker* (see page 4, *supra*), the government informed the district court in this case that it would not defend the constitutionality of the statute. It therefore requested that the court remand respondent's case to allow the Secretary to determine how self-employment income should be allocated in community property states, as the courts had done in *Becker*, *Hester* and *Carrasco* (Pet. App. 6a n.2). By order dated May 22, 1981, the district court granted respondent's motion for summary judgment on the issue of liability and denied the motion to remand respondent's case to the Secretary (*id.* at 3a). The court also certified a class of plaintiffs consisting of all applicants for and recipients of Old Age, Survivors, and Disability Insurance benefits whose benefits were denied or reduced by the operation of Section 211(a)(5)(A) due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state (Pet. App. 4a).[6]

On January 22, 1982, the district court issued an opinion resolving various questions regarding relief (Pet. App. 5a-12a). The court rejected the Secretary's proposal to allocate self-employment income to class members in the same sex-neutral manner in which such income is allocated between spouses in non-community property states. The court explained that under the Secretary's interpretation of Section 211(a) (42 U.S.C. (& Supp. V) 411(a)), self-

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[6] The court subsequently confined the class to those persons who received a final decision by the Secretary entered after August 20, 1980—60 days before Edwards filed the class action in district court (see 42 U.S.C. (Supp. V) 405(g))—denying or reducing benefits on the basis of Section 211(a)(5)(A). See Pet. App. 6a, 14a.

employment income can be derived only from partnerships or sole proprietorships. Thus, in non-community property states, if a married claimant cannot establish that a trade or business was carried on in a partnership with the other spouse, a determination is made as to which spouse was the sole proprietor and all income is then allocated to that spouse's account (Pet. App. 6a). In the court's view, this approach was "inappropriate" in a community property state, because the factual determination of which spouse was the sole proprietor would be more difficult in such a state, where each spouse owns 50% of the business. The court also asserted, without elaboration or citation to supporting evidence, that "[a] strong possibility exists that such a sex-neutral standard would result in practice in an unstated sexually discriminatory presumption" (*id.* at 6a-7a).

In addition, the district court stated that it was "not persuaded" by the Secretary's interpretation of Section 211(a) as limiting self-employment income to that derived from a partnership or sole proprietorship, explaining that the language of Section 211(a) "does not preclude the possibility of a co-proprietorship, where the business does not meet the partnership requirements but nevertheless employed both spouses" (Pet. App. 7a). The court therefore held that the class members "are entitled to an allocation of such co-proprietor income between the spouses' earnings accounts" and that the basis for such an allocation should be the relative amount of labor contributed by each (*ibid.*).*

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* As noted above (see note 4, *supra*), the Social Security Act does not recognize as covered employment an individual's work in a business in which his spouse is the sole proprietor. Under the district court's decision, however, this limitation essentially would be ignored in community property states,

The district court ordered that its new rule for the allocation of self-employment income between spouses in community property states be applied to the earnings accounts of class members retroactively to the inception of the coverage of self-employment in 1950 (Pet. App. 7a-10a). In so ordering, the court rejected the government's contention that, under this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971),[7] the elimination of the presumption in Section 211(a)(5)(A) in favor of husbands should be applied only to income derived after October 1980, the date of the government's acquiescence in the holding in *Becker* that Section 211(a)(5)(A) is unconstitutional (Pet. App. 7a).

In applying the *Chevron Oil* test, the district court observed that the unconstitutionality of Section 211(a)(5)(A) was foreshadowed by a line of sex discrimination cases decided by the Court over the preceding decade (Pet. App. 8a), although it failed to explain why that conclusion warranted retroactive application of the court's new allocation rule back to 1950. Moerover, in weighing the relative equities under *Chevron Oil*, the court recognized as a "serious problem" the possibility that retroactive reallocation of income could reduce some husbands' quarters of coverage so as to make them ineligible for benefits or reduce their income, and that some wives might be better off with their share of their husbands' accounts

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because an individual's work in a business fully managed and controlled by his spouse would be deemed self-employment of a "co-proprietor," and that individual would receive credit for Social Security earnings according to the relative amount of labor he contributed.

[7] See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 37-38 (plurality opinion).

than with their own. Rather than declining to order retroactive relief because of these considerations, however, the court simply ordered that no current recipient shall have his benefits reduced as a result of its decision and that wives who would receive greater benefits under the former system could elect to remain under it (Pet. App. 9a-10a). The court also held that its order mandating retroactive relief would not be limited by 42 U.S.C. (& Supp. V) 405(c)(1)(B) and 405(c)(4), which generally restrict to three years, three months, and fifteen days the period within which income entries in the Secretary's records may be corrected (Pet. App. 10a-11a).[8]

3. The Secretary filed a notice of appeal to the court of appeals on March 31, 1982 (Pet. App. 17a). In its Docketing Statement, filed on May 5, 1982, the government stated that it had conceded in district court that Section 211(a)(5)(A) is unconstitutional and that the remaining issues in district court concerned solely the relief to be granted. In the itemization in the Docketing Statement of the issues to be raised on appeal, the government listed only matters concerning relief; there was no mention of the constitutional issue.[9]

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[8] The court's January 22, 1982 opinion, as modified by an order of March 19, 1982, requires that notice of the decision be sent to all female class members residing in community property jurisdictions who were denied benefits after August 20, 1980 (Pet. App. 11a, 14a). Respondent Edwards' individual case was remanded to the Secretary for further proceedings under the standards announced in the court's decision (*id.* at 13a). Final judgment was entered against the Secretary on March 23, 1982 (*id.* at 16a).

[9] The relevant portion of the Docketing Statement provided:

H. Brief Description of Nature of Action and Result Below:

On June 2, 1982, respondents filed a motion to dismiss the government's appeal, contending that the court of appeals did not have jurisdiction under 28 U.S.C. 1291. Section 1291 does not provide for an appeal to the court of appeals "where a direct review may be had in the Supreme Court." See *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389, 391 (1982). Respondents argued that the government had a right to take a direct appeal to this Court under 28 U.S.C. 1252, which provides for

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Plaintiffs challenged the constitutionality of 42 U.S.C. 411(a)(5)(A), which requires that where both the husband and wife worked in a family business in a community property State, all of the self-employment income must be allocated to the husband. The government conceded the statute's unconstitutionality, and the remaining issues concerned relief, in particular, the standard to apply in place of the invalid statutory standard. The district court certified a class action, and ordered that the Secretary recompute benefits on the principle that the self-employment income of the business be split between husband and wife on the basis of their relative amounts of labor.

I. Issues to be raised on Appeal:

The issues on appeal may include: (1) whether the district court's standard based on relative amount of labor should be applied rather than the Secretary's standard based on whether there was a true partnership between the spouses; (2) whether it was error to apply the new rule to earnings records dating back to the beginning of the self-employment program; (3) whether it was error to require that no individual lose benefits as a result of the recomputation required under the order; and (4) whether the notice that the court required be sent to potential class members is appropriate.

The Docketing Statement is attached as Exhibit G to Resp. C.A. Br., *supra* note 3.

such an appeal from a judgment or order holding an Act of Congress unconstitutional in a civil action to which the United States or an agency or officer thereof is a party, even though the government sought review only of the district court's decision on non-constitutional issues of relief. Accordingly, they maintained, the Secretary could not take an appeal to the court of appeals to challenge the relief granted by the district court. See Resp. C.A. Br., *supra* note 3, at 4-5, 7-8.

In a one sentence order dated July 27, 1982, the court of appeals granted respondents' motion to dismiss the appeal for lack of jurisdiction, citing only 28 U.S.C. 1252 and *Donovan* v. *Richland County Association for Retarded Citizens*, *supra* (Pet. App. 1a).

SUMMARY OF ARGUMENT

I.

This Court previously has dismissed a direct appeal for lack of jurisdiction under 28 U.S.C. 1252 where the appellant did not challenge the lower court's holding of an Act of Congress unconstitutional and instead sought review only of the district court's ruling on relief. See *Montana Contractors' Association* v. *Kreps*, 442 U.S. 935 (1979). An analysis of the text, legislative history, and purposes of 28 U.S.C. 1252 confirms that the Court's resolution of the jurisdictional issue in *Montana Contractors' Association* was correct and should be followed here and that the court of appeals therefore had jurisdiction of the Secretary's appeal in this case under 28 U.S.C. 1291.

A. The text of 28 U.S.C. 1252 does not warrant a construction that would require appeals raising only nonconstitutional issues to be taken directly to this Court. This is especially so in light of the settled

rule that statutes authorizing appeals to this Court should be construed strictly. See *Perry Education Association* v. *Perry Local Educators Association*, No. 81-896 (Feb. 23, 1983), slip op. 5; *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 581 (1982).

1. The language of the first paragraph of 28 U.S.C. 1252 clearly indicates that the existence of a constitutional issue is a necessary prerequisite for taking a direct appeal. Under that paragraph, an appeal lies "from" a lower court decision "holding any Act of Congress unconstitutional," thereby directly linking the right of appeal with the holding of unconstitutionality. Moreover, because Section 1252 authorizes a direct appeal from an "interlocutory or final" order, an appeal may be taken from an order declaring an Act of Congress unconstitutional even before the district court has had an opportunity to consider questions of relief. If the Court were to affirm the lower court's constitutional ruling in such a case and remand for further proceedings on questions of relief, it could not seriously be contended that a second appeal would have to be taken directly to this Court on those questions, since the constitutional holding would no longer be in issue. The result should be no different in this case, in which the constitutional holding likewise no longer is—and never was—in issue.

In addition, Section 1252 authorizes a direct appeal only in cases in which the United States or an agency or officer thereof is a party, and thus is limited to situations in which the government "will be bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). The evident congressional purpose reflected in this language—to provide an expeditious means of removing the binding effect of the constitutional holding on the Executive Branch's administration of the law—would

not be served where, as here, the appeal presents solely questions of relief and this Court would not be asked to overturn the constitutional holding.

2. The structure of 28 U.S.C. 1252 confirms that a direct appeal lies only when the constitutional issue would be presented, because the second paragraph of Section 1252 expressly contemplates that appeals may be taken to courts other than the Supreme Court even in cases in which an Act of Congress has been held unconstitutional. Under the first sentence of the second paragraph, it is only *after* a party has received notice of a direct appeal under the first paragraph that other appeals also must be taken to this Court. And under the second sentence of the second paragraph, all appeals taken to other courts prior to such notice are treated as taken directly to this Court; they are not treated as jurisdictionally defective because they were not taken to this Court in the first instance.

The necessary corollary to these rules is that prior to or in the absence of a notice of direct appeal from a district court decision holding an Act of Congress unconstitutional, certain other appeals may be taken to the courts of appeals pursuant to 28 U.S.C. 1291. It is evident that the basis for distinguishing between the appeals that must be taken directly to this Court under the first paragraph of 28 U.S.C. 1252 and those for which the second paragraph preserves the right of appeal to the courts of appeals under 28 U.S.C. 1291 is whether the appeal itself presents the constitutional issue to which the first paragraph expressly refers.

B. The legislative history of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 751 *et seq.*, from which 28 U.S.C. 1252 is derived, also strongly supports the conclusion that the direct appeal mechanism is avail-

able only when the appellant actually seeks review of the lower court's constitutional holding. The committee reports and floor debates repeatedly discuss the direct appeal mechanism in the context of the constitutionality of an Act of Congress, and these materials reflect an intent to facilitate a prompt determination of such disputed questions. The debates also manifest an understanding that appeals raising other questions would continue to be taken to the courts of appeals.

C. The decisions of this Court make clear that 28 U.S.C. 1252 was intended to facilitate resolution of the constitutional question and thereby to remove a cloud upon the federal government's administration of the law. This purpose would not be served here, because the Secretary has not sought review of the constitutional ruling and thus will be bound by the holding of unconstitutionality irrespective of the outcome of the appeal on issues of relief. In any event, in all of the decisions respondents cite—including *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982), the sole authority relied upon by the court of appeals—the appellant in fact challenged the lower court's constitutional holding. This case is controlled instead by *Montana Contractors' Association* v. *Kreps*, *supra*, in which the Court dismissed an appeal under Section 1252 that sought review only on questions of relief.

II.

If the Court concludes that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291, the appropriate disposition under this Court's precedents would be to vacate the judgment below and remand to the court of appeals with in-

structions to remand to the district court for entry of a new judgment from which a direct appeal could be taken to this Court under 28 U.S.C. 1252.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION OVER THE APPEAL UNDER 28 U.S.C. 1291 BECAUSE THE SECRETARY WAS NOT SEEKING REVIEW OF THE DISTRICT COURT'S HOLDING THAT AN ACT OF CONGRESS IS UNCONSTITUTIONAL

Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over "appeals from all final decisions of the district courts * * *, except where a direct review may be had in the Supreme Court." See *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389, 391 (1982). The first paragraph of 28 U.S.C. 1252 in turn provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, * * * is a party." In this case, the court of appeals held that it did not have jurisdiction over the government's appeal under 28 U.S.C. 1291 because a direct review of the district court's final decision could have been had in this Court pursuant to 28 U.S.C. 1252, even though the Secretary did not seek review of the district court's holding that Section 211(a)(5)(A) of the Social Security Act is unconstitutional and challenged only the ruling on relief. This conclusion is directly inconsistent with a prior decision of this Court.

In *Montana Contractors' Association* v. *Kreps*, 442 U.S. 935 (1979), the Court, without dissent, dis-

missed an appeal for lack of jurisdiction under 28 U.S.C. 1252 where the appellants did not seek review of the district court's holding of an Act of Congress unconstitutional and instead sought review only on a nonconstitutional question of relief.[10] The government had moved to dismiss the appeal on the ground that a direct appeal may be taken under the first paragraph of 28 U.S.C. 1252 only if the party seeks review of the lower court's constitutional holding. See Mot. of the Fed. Appellee to Dismiss or Affirm at 6-9 (No. 78-1546, 1978 Term). In response to the government's motion to dismiss, the appellants filed a Reply Brief, in which they contended (at 2-3), as respondents do here (Br. in Opp. 2, 7), that this Court had jurisdiction under 28 U.S.C. 1252 over the issue of relief solely by virtue of the fact that the district court had held an Act of Congress unconstitutional, even though they did not seek review of the constitutional holding. The jurisdictional issue accordingly was joined in *Montana Contractors'*

[10] The district court had held unconstitutional 42 U.S.C. (Supp. V) 6705(f), the minority business enterprise provision that subsequently was upheld by this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). See *Montana Contractors' Association* v. *Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1978), appeal dismissed, 442 U.S. 935 (1979). Although the plaintiffs had sought an injunction against enforcement of the provision with respect to several projects, the district court enjoined enforcement only with respect to the sole remaining project for which a contract had not been let. The government did not take an appeal from that decision. The plaintiffs, however, took a direct appeal to this Court pursuant to 28 U.S.C. 1252, contending that the district court erred in not awarding damages to them against the federal and local officials responsible for administering the statutory provision that the district court had held unconstitutional. J.S. at 4, 9-13, 12a (No. 78-1546, 1978 Term).

Association, and the dismissal of the appeal in that case therefore must be viewed as a holding by this Court that a direct appeal does not lie under 28 U.S.C. 1252 in such circumstances.

Because *Montana Contractors' Association* did not fall within the exception from the general grant of appellate jurisdiction to the courts of appeals under 28 U.S.C. 1291 for cases "where a direct review may be had in the Supreme Court," the necessary corrollary to the Court's dismissal of the appeal in *Montana Contractors' Association* is that an appeal from the district court's ruling on relief in that case *did* lie to the court of appeals under 28 U.S.C. 1291. It follows that the court of appeals likewise had jurisdiction over the Secretary's appeal in the instant case. This conclusion also is consistent with a recent decision of the United States Court of Appeals for the Seventh Circuit holding that an appeal was properly taken to that court under 28 U.S.C. 1291, rather than to this Court under 28 U.S.C. 1252, in a case in which the government did not challenge the district court's holding of an Act of Congress unconstitutional and challenged only the district court's ruling on relief. *Denberg* v. *United States Railroad Retirement Board*, No. 81-2386 (7th Cir. May 10, 1983) (order on petition for rehearing, amending the opinion reported at 696 F.2d 1193 (1983)); see pages 36-41, *infra*.

As we explain below, a consideration of the text, legislative history, and purposes of 28 U.S.C. 1252 strongly reinforces the soundness of the disposition of the appeals in *Montana Contractors' Association* and *Denberg*, and thus further demonstrates that the court below erred in dismissing the Secretary's appeal under 28 U.S.C. 1291.

A. The Language And Structure Of 28 U.S.C. 1252 Establish That A Direct Appeal To This Court Does Not Lie If The Appellant Does Not Seek Review Of The Lower Court's Holding That A Federal Statute Is Unconstitutional

"As with any issue of statutory construction, we 'must begin with the language of the statute itself.'" *Bowsher* v. *Merck & Co.*, No. 81-1273 (Apr. 19, 1983), slip op. 5-6 (footnote omitted), quoting *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982), and *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). Moreover, in another case involving a jurisdictional statute authorizing an appeal to this Court in cases presenting questions of the constitutionality of an Act of Congress, the Court recently stressed that

> when the statute to be construed creates * * * a class of cases that command the immediate attention of this Court * * *, close construction of statutory language takes on added importance. As we have said: "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes'; and we are particularly prone to accord 'strict construction of statutes authorizing appeals' to this Court." *Palmore* v. *United States*, 411 U.S. 389, 396 (1973) (citations omitted).

Bread Political Action Committee v. *FEC*, *supra*, 455 U.S. at 580-581. See also *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (Feb. 23, 1983), slip op. 5.

To be sure, this Court has observed that in enacting 28 U.S.C. 1252, Congress "unambiguously mandated" an exception—applicable "in the narrow circumstances that the section identifies"—to the overriding policy of minimizing the mandatory docket of

this Court.[11] *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975).[12] As the text and structure of Section 1252 make clear, the "narrow circumstances that the section identifies" are those in which the appellant actually seeks review of the holding of a lower federal court that an Act of Congress is unconstitutional. This Court, of course, must give full effect to Congress's provision for direct review in those circumstances. But the obvious fact that Congress wanted this class of cases to be speedily resolved "scarcely implies that Congress intended the courts to augment Congress'[s] enumeration" (*Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 583) by also requiring that a direct appeal be taken in other cases in which this Court would not be asked to consider the question of the constitutionality of an Act of Congress, for which the direct appeal mechanism was designed.

1. The language of the first paragraph of 28 U.S.C. 1252 itself indicates that a challenge to the lower court's constitutional ruling is necessary to support a direct appeal to this Court. Under that paragraph, a direct appeal lies "from" a judgment, decree, or order "holding any Act of Congress uncon-

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[11] See *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974).

[12] Accordingly, the Court held in *McLucas* v. *DeChamplain* that it had jurisdiction under 28 U.S.C. 1252 over an appeal challenging the district court's holding of an Act of Congress unconstitutional, even though the single-judge district court did not have jurisdiction over the case under 28 U.S.C. (1970 ed.) 2282. Although under established precedent the failure to convene a three-judge district court as required by 28 U.S.C. (1970 ed.) 2282 would have barred a direct appeal to this Court under 28 U.S.C. 1253, the Court declined to read into 28 U.S.C. 1252 the limitations on direct appeal contained in 28 U.S.C. 1253. 421 U.S. at 29-31.

stitutional," thereby directly linking the right of appeal with the holding of unconstitutionality. In the instant case, the Secretary has not appealed from the district court's holding of unconstitutionality, and that holding will be unaffected even if the government prevails on its appeal of the relief ordered by the district court. The first paragraph of Section 1252 does not suggest that Congress intended to bring such an appeal under a procedure that manifestly was intended for resolution of constitutional issues.

In addition, because a direct appeal lies under 28 U.S.C. 1252 whether the order appealed from is "interlocutory or final," a direct appeal may be taken to this Court from an order declaring a statute unconstitutional that was issued before the district court even had an opportunity to consider questions of relief. If the Court were to affirm such an interlocutory order striking down a federal statute and remand to the district court for further proceedings only on questions of relief, it could not seriously be contended that a direct appeal again must be taken to this Court under 28 U.S.C. 1252 simply to challenge the district court's order granting relief. The congressional purpose of providing a prompt resolution of the constitutional issue already would have been served on the previous direct appeal, and it would be pointless to crowd this Court's mandatory docket with an appeal raising only subsidiary issues. Cf. *Denberg* v. *United States Railroad Retirement Board*, *supra*; see pages 37-38, *infra*. Thus, it seems plain that Congress did not intend this Court to review questions of relief in the first instance in *every* case in which an Act of Congress has been held unconstitutional, including those cases in which the constitutional holding itself no longer is in issue because a prior decision of this Court has disposed of the matter. The result should be no different in the

instant case, where the district court's constitutional holding likewise no longer is—and never was—in issue.

It is significant as well that the first paragraph of 28 U.S.C. 1252 authorizes a direct appeal to this Court from a lower court's holding of an Act of Congress unconstitutional only in civil actions "to which the United States or any of its agencies, or any officer or employee thereof, * * * is a party"; no direct appeal lies to review a lower court's constitutional holding if there are only non-federal parties to the suit.[13] As this Court has observed, the quoted language serves to furnish a right of direct appeal where the government has participated in the litigation "and thus will be bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31. The language of Section 1252 therefore reveals a congressional purpose to assure an expeditious means of removing the restraint on the federal government's administration of the law when it would be bound by a holding that the law in question is unconstitutional, either on its face or as applied.[14] That statutory purpose would not be furthered by requiring that a direct appeal be taken in this case: because the government's concession in district court that Section 211(a)(5)(A) is unconstitu-

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[13] Of course, where the United States or an agency or officer thereof is a party to the suit, a direct appeal may be taken to this Court by "any party," not only by the government. See, *e.g.*, *United States* v. *Bekins*, 304 U.S. 27 (1938).

[14] 28 U.S.C. 1252 authorizes a direct appeal whether the Act of Congress has been held unconstitutional on its face or as applied. *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 11; *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-103 (1947).

tional and the resulting decision not to raise this issue on appeal obviously were intended to bind the Secretary in her nationwide administration of the Social Security Act, there was no need to resort to the special statutory review procedure in 28 U.S.C. 1252 in an effort to remove the binding effect of the district court's holding reaching the same conclusion.[15]

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[15] The language of Section 2 of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 752, from which 28 U.S.C. 1252 is derived (see *California* v. *Grace Brethren Church*, *supra*, slip op. 11), does not suggest a different result. Section 2 provided in pertinent part:

> In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; * * *.

The language providing for a direct appeal where "the decision" is against the constitutionality of a federal statute indicates that this is the only "decision" from which such an appeal lies. A direct appeal may not be taken to review the lower court's decision on other issues, although if a direct appeal is taken to review the constitutional holding, the appeal brings the whole case before the Court and other aspects of the case may be reviewed as well. See, *e.g.*, *Williams* v. *Zbaraz*, 448 U.S. 358, 368 n.10 (1980).

The codification of Section 2 at 28 U.S.C. 1252 resulted in a number of changes in phraseology, but the language of the provision as originally enacted is of some assistance in interpreting the scope of the present provision. See 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037, at 50 (1978).

2. The interpretation we urge is supported not only by the language of the first paragraph of 28 U.S.C. 1252, but by the "structure of the Act" as well. *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, No. 81-1891 (May 24, 1983), slip op. 9; *FBI* v. *Abramson*, 456 U.S. 615, 625 (1982); *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). Although it is the first paragraph of Section 1252 that actually grants the right of direct appeal, the second paragraph of that Section confirms that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court pursuant to the first paragraph. The second paragraph of Section 1252 provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

The first sentence of this paragraph establishes that it is only *after* a party has filed a notice of direct appeal pursuant to the first paragraph of Section 1252 that all appeals or cross appeals in a case in which an Act of Congress has been held unconstitutional must be taken to this Court. The necessary corollary to this rule is that prior to or in the absence of such notice, as here, certain other appeals in the case may be taken to the court of appeals.

The second sentence of the second paragraph of 28 U.S.C. 1252 provides that all appeals taken to "other courts" prior to the filing of the notice of appeal to this Court pursuant to the first paragraph of Section

1252 "shall be treated as taken directly to the Supreme Court"; such appeals to other courts therefore are not regarded as jurisdictionally defective because they were not taken directly to this Court in the first instance. It necessarily follows that if a notice of appeal to this Court pursuant to the first paragraph of Section 1252 is not filed, appeals taken to "other courts"—in this case, to the court of appeals—likewise are not, for that reason, jurisdictionally defective. Cf. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4037, at 53 (1978).

Thus, 28 U.S.C. 1252, read as a whole, divides appeals in cases in which a district court has held an Act of Congress unconstitutional into two categories: those that must be taken directly to this Court under the first paragraph, and those for which the second paragraph makes clear that the generally applicable right of appeal to the court of appeals pursuant to 28 U.S.C. 1291 is preserved. Reading 28 U.S.C. 1252 " 'with precision and fidelity to the terms by which Congress has expressed its wishes' " (*Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 580; citation omitted), it is evident that the basis for distinguishing between the two categories is whether the appeal itself presents the question of the constitutionality of an Act of Congress to which the first paragraph explicitly refers.[16] Limiting the right of direct

[16] This Court's jurisdiction under 28 U.S.C. 1252 therefore depends not on whether the constitutional question was contested in the court that held the Act of Congress unconstitutional, but rather on whether this Court would be asked to review the constitutional holding. See note 26, *infra*; see also Reply Br. for the Appellant in response to the Mot. to Dismiss at 3-10, *INS* v. *Chadha* (No. 80-1832, 1980 Term). Such cases would include those in which the appellant challenges the district court's interpretation of the Act of Con-

appeal to these "narrow circumstances that the section identifies" (*McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31) also is consistent with the principle of according strict construction of statutes authorizing appeals to this Court (*Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 581).

When a direct appeal is taken to this Court, the Court of course has jurisdiction to decide " 'not only the constitutional question, but the whole case' " (*Williams* v. *Zbaraz*, 448 U.S. 358, 368 n.10 (1980), quoting *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31), including nonconstitutional questions such as those concerning the relief to be granted if the holding of unconstitutionality is affirmed.[17] But when the appellant does not seek review of the holding of unconstitutionality, a direct appeal does not lie to this Court under 28 U.S.C. 1252 on any issue.[18] An appeal from

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gress that in turn led the court to hold the Act unconstitutional. See, *e.g.*, *Donovan* v. *Blitz*, vacated as moot, No. 82-611 (Jan. 10, 1983). In such a case, if this Court were to adopt the appellant's statutory construction, it would set aside the holding of unconstitutionality. See *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

[17] The provision in the second paragraph of Section 1252 for all other appeals and cross-appeals to be taken to this Court when a direct appeal has been taken under the first paragraph ensures that there will not be duplicative proceedings in the court of appeals and this Court on these nonconstitutional questions. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

[18] The conclusion that an appeal lies under the first paragraph of 28 U.S.C. 1252 only when the appellant seeks review of the lower court's holding that an Act of Congress is unconstitutional is supported not only by the structure of Section 1252 itself, but also by the structure of Chapter 81 of Title 28 of the United States Code with respect to this

nonconstitutional aspects of the district court's decision therefore must pursue the normal route—to the court of appeals pursuant to 28 U.S.C. 1291. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

Court's appellate jurisdiction generally. In 28 U.S.C. 1257(1) and (2), Congress has provided a right of appeal from the decision of the highest court of a state holding a federal statute unconstitutional or holding a state statute constitutional. Section 1257 long has been understood to confer appellate jurisdiction only over the specified constitutional issue decided by the state court. Other federal issues involved in the case may be raised only under the Court's certiorari jurisdiction. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476, 487 n.14 (1975); *DeBacker* v. *Brainard*, 396 U.S. 28, 32 (1969); *Mishkin* v. *New York*, 383 U.S. 502, 512 (1966); *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 547 (1922); see also *Doe* v. *Delaware*, 450 U.S. 382, 385 n.5 (1981) (Brennan, J., dissenting). See generally R. Stern & E. Gressman, *supra*, § 3.6, at 169-172.

Similarly, 28 U.S.C. 1254(2), which permits an appeal by a party "relying on a State statute" held unconstitutional by a federal court of appeals, expressly provides that "review on appeal shall be restricted to the Federal questions presented." This provision has been understood to mean that questions concerning the constitutionality of the state statute must be at least among, if not the only, "Federal questions presented." R. Stern & E. Gressman, *supra*, § 2.7, at 68-69; 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 435.01[2], at 6-55 to 6-56 (1982 ed.); cf. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976). See also 2 U.S.C. 437h(b) (limiting appeal to this Court to cases under the Federal Election Campaign Act of 1971 in which a constitutional issue is raised); *Pothier* v. *Rodman*, 261 U.S. 307, 311-312 (1923) (construing the direct appeal provision of Section 2 of the Act of Jan. 28, 1915, ch. 22, 38 Stat. 804).

There is no reason to believe that Congress intended to depart from this pattern in 28 U.S.C. 1252.

B. The Legislative History Of 28 U.S.C. 1252 Supports The Conclusion That A Direct Appeal Is Available Only If The Appellant Seeks Review Of The Lower Court's Constitutional Holding

The legislative history of 28 U.S.C. 1252 strongly supports the conclusion that the direct appeal mechanism is available only when the constitutional holding will be subject to review and possible reversal on appeal. The direct appeal provision in 28 U.S.C. 1252 was first enacted as Section 2 of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 752. The House, Senate and Conference Reports on that measure all described the bill as one providing, in pertinent part, for "appeal by the United States in certain cases in which the constitutionality of acts of Congress is involved" (H.R. Rep. No. 212, 75th Cong., 1st Sess. 1 (1937); S. Rep. No. 963, 75th Cong., 1st Sess. 1 (1937); H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. 5 (1937)). In addition, the House Report explained that the purpose of the provision was to ensure a "prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress" (H.R. Rep. No. 212, *supra*, at 2). The Senate Report similarly refers to the power of the Attorney General "to take a question of constitutionality to the Supreme Court" (S. Rep. No. 963, *supra*, at 2). In this case, no "question"—much less a "disputed question[]"—of the constitutionality of an Act of Congress is "involved" in the Secretary's appeal or will be submitted for a "determination" by the appellate court; the government has conceded the unconstitutionality of Section 211(a)(5)(A) of the Social Security Act and seeks review only of other issues.

The floor debates also demonstrate that the direct appeal mechanism was intended for resolution of the central constitutional question. Thus, Representative

Sumners, Chairman of the House Judiciary Committee and sponsor of the bill, explained that the Attorney General should be granted "the right to appeal directly to the Supreme Court from an adverse decision on the question of constitutionality" (81 Cong. Rec. 3254 (1937)) "in order to expedite the determination of the constitutional question" (*id.* at 3272).[19] This, he explained, would "shut[] off a long period of suspense for the litigants in other cases" if the "determination is against the constitutionality of the act" (*id.* at 3256). Similarly, Representative Chandler explained that passage of the measure was necessary because, although Congress had enacted numerous laws, it had "not expedited the determination of their constitutionality when the lower courts declare them invalid" (*id.* at 3273).

Representative Sumners was asked whether, when the Attorney General intervened in a suit between private parties involving the constitutionality of an Act of Congress and took an appeal directly to the Supreme Court following the district court's holding of unconstitutionality, "this [would] take the entire case directly to the Supreme Court * * * or just the question of constitutionality?" 81 Cong. Rec. 3260 (1937) (remarks of Rep. McFarlane). Representative Sumners did not respond directly to this question, although the Court of course has since held that a direct appeal brings up the "whole case." See,

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[19] See also 81 Cong. Rec. 3261 (1937) (remarks of Rep. Sumners; emphasis added):

> When the *question of the constitutionality of an act of Congress* is raised, and it is a serious question, it is the judgment of the members of the committee that *that question* ought to be presented to the Supreme Court just as quickly as it can be carried there properly.

e.g., *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 368. But Representative Sumners did stress in his answer that the case "would come up on the question of constitutionality." 81 Cong. Rec. 3260 (1937).

Another Member inquired further regarding the other issues that could be involved in the case (81 Cong. Rec. 3261 (1937) (remarks of Rep. Dowell)):

> Assuming that litigants have other questions involved and that on the other questions an appeal is taken from the district court. Assume further the Attorney General intervenes on a constitutional question. How would the litigant proceed in the court of appeals so far as their appeal is concerned?

Representative Sumners remarked that he did not know what arrangement would be made for cases in which separate appeals were taken to the court of appeals and the Supreme Court (*id.* at 3261), perhaps because the Committee's recommended bill did not contain a provision similar to that now embodied in the second paragraph of 28 U.S.C. 1252 (see 81 Cong. Rec. 3269 (1937)). The bill passed by the Senate responded to this concern through its provision (contained in Section 2 of the bill as enacted and now incorporated in the second paragraph of Section 1252) for other appeals in the case to be taken to this Court as well, but *only* if a direct appeal first has been taken to this Court under what is now the first paragraph of Section 1252. See S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937).[20] Thus, where, as here, a

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[20] The House bill provided for direct appeal only by the Attorney General, not by other parties to the case. 81 Cong. Rec. 3269-3270, 3272-3273 (1937). It thus was clear that under the House bill, appeals by other parties on nonconstitutional questions (as well as the constitutional issue) would

direct appeal has not been taken to this Court from the district court's holding of unconstitutionality, the right of appeal to the court of appeals on what Representative Dowell referred to as "other questions" (81 Cong. Rec. 3261 (1937)) was preserved.

The legislative history therefore leaves no doubt that Congress enacted 28 U.S.C. 1252 for the purpose of making a direct appeal available in those situations in which the question of the constitutionality of an Act of Congress would actually be presented to this Court. The legislative history likewise confirms what the second paragraph of 28 U.S.C. 1252 itself clearly indicates: Congress intended that appeals raising only other issues would continue to be taken to the court of appeals.

C. The Court Of Appeals' Dismissal Of The Appeal Is Not Supported By Decisions Of This Court Or The Courts Of Appeals

1. The opinions of this Court construing 28 U.S.C. 1252 offer no support for the decision of the court of appeals in this case. Those opinions make clear, as we have said (see page 21, *supra*), that the purpose

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have been taken to the court of appeals. The Senate bill, and the law as enacted, made the right of direct appeal available to any party, not merely the federal government, yet at the same time incorporated the provision now contained in the second paragraph of 28 U.S.C. 1252, which expressly contemplates that certain appeals in cases in which an Act of Congress has been held unconstitutional will continue to be taken to the court of appeals. S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937). The simultaneous adoption of these changes reinforces the conclusion that Congress deliberately preserved the right of appeal to the court of appeals when only nonconstitutional issues will be presented on appeal. See *Lehman* v. *Nakshian*, 453 U.S. 156, 167-168 (1981).

of Section 1252 is " 'to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality.' " *California* v. *Grace Brethren Church*, *supra*, slip op. 11, quoting *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31; see also *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, 454 U.S. at 390-391 & n.3. Because, in these circumstances, the Executive will be required to adhere to the holding of unconstitutionality and to disregard the contrary provisions of a duly enacted law, Congress determined that a proper regard for the role of the Legislative Branch and the need to remove a cloud from the administration of the statute in question warrant a prompt and definitive resolution of the constitutional question by the only Court capable of providing it. *McLucas* v. *DeChamplain*, *supra*; *Fleming* v. *Rhodes*, 331 U.S. 100, 104 & n.6 (1947); *Reid* v. *Covert*, 351 U.S. 487, 490 (1956), vacated on other grounds, 354 U.S. 1 (1957); 81 Cong. Rec. 3254-3255, 3268-3269 (1937) (remarks of Rep. Sumners).

These policies simply have no application in a case such as this. Where the government does not seek review of the lower court's constitutional holding, immediate review in this Court on subsidiary questions of relief would not remove the binding effect of the lower court's constitutional ruling and thus would not further the congressional purpose underlying the availability of immediate review. That conclusion is especially apparent here, because the government has conceded the unconstitutionality of Section 211(a)(5)(A) of the Social Security Act in a nationwide class action in which the judgment will bind the Secretary on the constitutional issue in the nationwide administration of the law. Moreover, the Attorney

General formally adopted this position because the unconstitutionality of the statutory provision was dictated by prior decisions of this Court. Thus, this Court, in effect, already has performed the function that Congress intended by the enactment of 28 U.S.C. 1252 by rendering an authoritative decision that resolves the question of the constitutionality of the statutory provision at issue. It would be pointless to construe Section 1252 to preclude the Secretary from foregoing the right of direct appeal in these circumstances and from raising only unresolved issues of relief in the court of appeals. Such a requirement needlessly would add a new category of cases to this Court's mandatory appellate docket at a time when the burden on this Court is increasing in other respects. See *Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 580-581.

The only authority the court of appeals cited in its order dismissing the appeal was this Court's decision in *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*. See Pet. App. 1a. But that decision obviously has no application here. There, the Secretary of Labor *did* challenge the district court's holding that the Fair Labor Standards Act was unconstitutional as applied to a particular employer, and the Secretary's appeal seeking review of this constitutional holding therefore unquestionably had to be taken to this Court. *Richland County* does not suggest that an appeal that does not present the constitutional question must be brought directly to this Court as well.

2. In all of the cases cited by respondents in their Brief in Opposition, the party who invoked this Court's jurisdiction under 28 U.S.C. 1252 likewise sought review of the lower court's constitutional hold-

ing. See *California* v. *Grace Brethren Church*, *supra*, slip op. 1, 10-13, 24-25; *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*; *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 366;[21] *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980);[22] *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31;[23] *United States* v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-104, 106-107 (1947). None of these decisions addresses the quite different question involved in this case. *Montana Contractors' Association* v. *Kreps*, *supra*, does address that question and holds that an appeal does not lie under Section 1252 if the appellant does not seek to overturn the constitutional adjudication and instead seeks review only on questions of relief.[24]

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[21] See J.S. 7 (No. 79-4, 1979 Term); J.S. 6, 16 (No. 79-5, 1979 Term); J.S. 2 (No. 79-491, 1979 Term).

[22] See J.S. 2 (No. 78-1513, 1978 Term).

[23] See J.S. 2 (No. 78-1846, 1973 Term).

[24] In *Regan* v. *Taxation With Representation of Washington*, Nos. 81-2338 and 82-134 (May 23, 1983), the Secretary of the Treasury took a direct appeal (No. 81-2338) under 28 U.S.C. 1252 from the court of appeals' decision holding 26 U.S.C. 501(c)(3) unconstitutional under the Fifth Amendment, and the appellee filed a cross-appeal (No. 82-134) under 28 U.S.C. 1252 seeking review of the court of appeals' rejection of its argument that 26 U.S.C. 501(c)(3) also was unconstitutional under the First Amendment. The Court, without discussion, stated that the "language [of the first paragraph of 28 U.S.C. 1252] is broad enough to encompass appellee's cross-appeal" and denied the government's motion to dismiss the appeal. *Regan* v. *Taxation With Representation*, *supra*, slip op. 2-3 n.3.

Regan v. *Taxation With Representation* expressly holds only that a *cross*-appeal that does not seek review of the lower court's holding of an Act of Congress unconstitutional may

Respondents nevertheless contend (Br. in Opp. 4) that this Court's decision in *United States* v. *Clark*, *supra*, supports their position. This contention is plainly wrong. In *Clark*, the appellee argued that an appeal did not lie under 28 U.S.C. 1252 because the Court of Claims did not actually hold an Act of Congress unconstitutional—one of the explicit threshold requirements for taking an appeal under Section 1252. Instead, it was argued, the government had conceded that a prior decision of the Court of Claims holding the same statute unconstitutional was dispositive, and the prior decision therefore was the one in which the statute was held unconstitutional.[28] This Court concluded, however, that a determination that the statutory provision was unconstitutional "was a necessary predicate to the relief" granted to the appellee's children and that "this determination of unconstitutionality may be appealed under § 1252" (445 U.S. at 26 n.2), even though the Court of Claims had reached its conclusion by relying on its earlier ruling (*ibid.*). Thus, although the government had conceded in *Clark* that the case was controlled in the Court of Claims by a prior decision of that court, the government did not

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be brought under the first paragraph of Section 1252. (If jurisdiction rests under 28 U.S.C. 1252 for a cross-appeal such as that involved in *Regan* v. *Taxation With Representation*, it would, in our view, appear to be pursuant to the second paragraph of Section 1252, which expressly addresses the question of cross-appeals.) Moreover, the particular cross-appeal at issue raised an alternative ground for holding the statute unconstitutional and therefore was closely intertwined with the direct appeal. This case, in contrast, concerns jurisdiction over a direct appeal, not a cross-appeal, and it raises no issue concerning the constitutionality of a federal statute.

[28] Mot. to Aff. 13 (No. 78-1513, 1978 Term).

concede that the statute was unconstitutional; to the contrary, it sought review of the constitutional holding in this Court. In the instant case, unlike in *Clark*, it is not the "determination of unconstitutionality" that the Secretary seeks to have reviewed (445 U.S. at 26 n.2), but other matters.[26]

Respondents' reliance (Br. in Opp. 3) on *California* v. *Grace Brethren Church*, *supra*, is misplaced for the same reason. Quoting a phrase from the opinion in that case out of context, respondents contend that so long as the "determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' " (slip op. 11, quoting *United States* v. *Clark*, *supra*, 445 U.S. at 26 n.2), a direct appeal lies to this Court under 28 U.S.C. 1252. As explained below, however, the question involved in *Grace Brethren Church*, like that in *Clark*, was whether the district court had actually decided the question of the constitutionality of an Act of Congress so that the appellants could in turn take a direct appeal for the purpose of presenting that same question to this Court.

Although the district court in *Grace Brethren Church* did not expressly hold the provision of the Federal Unemployment Tax Act, 26 U.S.C. (& Supp. V) 3301 *et seq.* (FUTA), unconstitutional (*Grace*

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[26] Respondents contend (Br. in Opp. 4) that *Clark* is similar to this case because there, as here, the only issues considered by the lower court related to relief. The relevant inquiry for purposes of 28 U.S.C. 1252, however, is not what issues the lower court actively "considered" (rather than regarded as conceded by a party or foreclosed by prior decisions), but whether the lower court's decision necessarily was predicated on a determination that an Act of Congress was unconstitutional *and* whether this Court would be asked to pass on that determination. If so, as in *Clark*, a direct appeal lies; if not, as here, a direct appeal does not lie.

Brethren Church, supra, slip op. 11), it did hold the closely related state statute unconstitutional and enjoined the state officials from collecting taxes under it (*id.* at 8). This Court concluded that the district court's holding that the state statute was unconstitutional was based solely on the court's understanding of the FUTA (*Grace Brethren Church, supra*, slip op. 9-11). Accordingly, the Court held, in the passage quoted above and by respondents, that a determination that the FUTA was unconstitutional "was a necessary predicate to the relief" granted against the state officials and that an Act of Congress therefore had been held unconstitutional for purposes of 28 U.S.C. 1252. For this reason, the state and federal officials were free to take a direct appeal to challenge this constitutional holding. The Court did not suggest that a direct appeal would have been available if the state and federal officials had acquiesced in and therefore had not sought review of the district court's constitutional holding and the state officials had appealed only the relief ordered by the district court, as the Secretary did here.

3. The conclusion that the court of appeals had jurisdiction over the Secretary's appeal in this case also is supported by a recent decision of the Seventh Circuit. In *Denberg* v. *United States Railroad Retirement Board*, No. 81-2386 (May 10, 1983) (order on rehearing amending the opinion reported at 696 F.2d 1193), that court held that a direct appeal did not lie under 28 U.S.C. 1252 in a case in which the government did not seek review of the lower court's holding that a federal statute was unconstitutional.

Denberg was a class-action challenge to a provision of the Railroad Retirement Act, 45 U.S.C. 231a(c)(3)(ii), which provides that a husband is eligible for spouse's benefits only if he was receiving at least one-

half of his support from his wife at the time she began to receive benefits. After this Court held a parallel provision of the Social Security Act unconstitutional in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), the Court summarily affirmed a decision holding 45 U.S.C. 231a(c)(3)(ii) unconstitutional. See *Railroad Retirement Board* v. *Kalina*, 431 U.S. 909 (1977), aff'g 541 F.2d 1204 (6th Cir. 1976). In light of *Kalina*, the government conceded in district court in *Denberg* that 45 U.S.C. 231a(c)(3)(ii) was unconstitutional. *Denberg* v. *United States Railroad Retirement Board*, No. 76 C 864 (E.D. Ill. June 8, 1981), slip op. 2; see also 696 F.2d at 1194. The only remaining question concerned the scope of relief. The district court granted retroactive relief to all class members, entitling them to recover even for periods prior to this Court's decision in *Goldfarb*, and the government appealed this ruling on relief to the court of appeals pursuant to 28 U.S.C. 1291.

The court of appeals did not address the question of its jurisdiction over the appeal in its initial opinion.[27] But in an order entered on petition for rehearing, the court added a paragraph to its original opinion, stating (Order, *supra*, at 2):

> Since the statute was held unconstitutional by the Supreme Court in *Kalina* before the district court entered its judgment from which the government has appealed, section 1252 of the Judicial Code, which read in light of section 1291

[27] The court of appeals held that the district court did not have subject matter jurisdiction over the case under 28 U.S.C. 1337 because the plaintiff should have sought judicial review of the denial of benefits in the court of appeals, as required by 45 U.S.C. 231g and 355(f). It therefore ordered that the case be dismissed without reaching the merits. 696 F.2d at 1195-1198.

> gives the Supreme Court exclusive jurisdiction over appeals from any federal district court order holding an Act of Congress unconstitutional in a suit to which the federal agency is a party, is inapplicable. The judgment appealed from was not a judgment holding a statute unconstitutional—the statute had already been held unconstitutional by the Supreme Court in another case—but a judgment concerning the remedial consequences of the statute's unconstitutionality. Once the unconstitutionality of a statute has been authoritatively determined by the Supreme Court, there is no purpose in allowing an expedited appeal to the Court from a subsequent district court judgment merely premised on that determination.

The Seventh Circuit correctly concluded that it had jurisdiction under 28 U.S.C. 1291 over the appeal raising only nonconstitutional issues of relief, but its analysis was flawed. The test for determining whether a direct appeal may be taken under 28 U.S.C. 1252 is not whether this Court previously has decided the precise constitutional question arising under the same statute. This Court had not previously held unconstitutional the particular statute involved in *Montana Contractors' Association* v. *Kreps*, *supra*, when the appeal in that case was taken to this Court,[28] but the Court nevertheless dismissed the appeal.

Moreover, contrary to the view of the Seventh Circuit in *Denberg*, the district court in that case plainly *did* hold an Act of Congress unconstitutional for purposes of 28 U.S.C. 1252, because "a determination that [the] statutory provision was unconstitutional

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[28] To the contrary, this Court subsequently sustained the constitutionality of that statute in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

'was a necessary predicate to the relief' that the lower court granted" in the form of retroactive benefits to class members. See *California* v. *Grace Brethren Church*, *supra*, slip op. 11, quoting *United States* v. *Clark*, *supra*, 445 U.S. at 26 n.2. To be sure, the district court's predicate determination of unconstitutionality was dictated by this Court's summary affirmance in *Kalina*. But the fact that the district court simply applied what it perceived to be controlling precedent to the case before it does not mean that it thereby failed to hold an Act of Congress unconstitutional; as we have said, the relief ordered by the district court necessarily was based on a conclusion that the statute was unconstitutional.

Furthermore, a lower court's decision on a constitutional question almost always will be based at least to some extent on prior decisions of this Court. Occasionally, as in *Denberg*, one of this Court's decisions will be precisely on point because it disposed of the same constitutional question arising under the same statute that is challenged in the lower court. In other instances, a different statutory provision might have been involved in the prior decision of this Court, but the Court's reasoning nevertheless will be deemed by the lower court as controlling. In still other instances, this Court's prior decisions will be relied upon only for their inferential support. The existence of appellate jurisdiction under 28 U.S.C. 1252 cannot be made to turn on difficult judgments regarding the degree to which the lower court's predicate determination of unconstitutionality was dictated by precedent.[29]

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[29] For example, after this Court rendered its decision in *Califano* v. *Goldfarb*, the Court, in *Kalina*, summarily affirmed a court of appeals decision holding the parallel provision of the Railroad Retirement Act unconstitutional. Al-

The Court's decision in *United States* v. *Clark*, *supra*, strongly supports this conclusion. There, the Court rejected the contention that a direct appeal did not lie under 28 U.S.C. 1252 because the Court of Claims had based its holding that the statutory provision involved was unconstitutional on a prior decision of that court reaching the same result. The Court explained that "[a]n appeal under § 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional in a civil action in which the United States is a party, not just for the first such decision." 445 U.S. at 26-27 n.2. The result should be no different where, as in *Denberg*, the precedent that was deemed controlling by the lower court was a decision of this Court. Thus, the court of appeals rather than this Court had jurisdiction over the appeal in *Denberg* not because the district court had failed to hold the statute unconstitutional—it clearly so held—but because the government was not challenging that predicate determination of unconstitutionality and in-

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though different statutory provisions were involved in the two cases, those provisions were indistinguishable for purposes of constitutional analysis. If this Court had not decided *Kalina*, the district courts' decision in *Denberg* regarding the same provision of the Railroad Retirement Act would have been equally controlled by this Court's decision in *Goldfarb*. It is unclear whether the Seventh Circuit's suggested analysis in *Denberg* would require that an appeal seeking review only of the district court's ruling on relief be taken to this Court under 28 U.S.C. 1252 in such a case, because this Court would not yet have applied its holding in *Goldfarb* to the Railroad Retirement Act, or, instead, whether the Court's decision in *Goldfarb* would be deemed sufficiently controlling on the same constitutional question arising under the Railroad Retirement Act that a direct appeal would not have to be taken to this Court.

stead was seeking review only on questions of relief. The court of appeals had jurisditcion over the Secretary's appeal in the instant case for the same reason.

II. IF THE COURT CONCLUDES THAT THE COURT OF APPEALS DID NOT HAVE JURISDICTION, THE COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND WITH INSTRUCTIONS FOR THE ENTRY OF A NEW JUDGMENT FROM WHICH A DIRECT APPEAL MAY BE TAKEN TO THIS COURT

For the reasons explained in Point I, construing the first paragraph of 28 U.S.C. 1252 in a manner that does not provide for direct appeal to this Court solely on nonconstitutional issues "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the Act." *FBI* v. *Abramson*, *supra*, 456 U.S. at 625 (footnote omitted). But if the Court nevertheless concludes that the Secretary's appeal should have been taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, it is respectfully submitted that the appropriate disposition would be to vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal could be taken to this Court. See *Query* v. *United States*, 316 U.S. 486, 490-491 (1942); see also *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972); *Phillips* v. *United States*, 312 U.S. 246, 254 (1941); 28 U.S.C. 2106.

The Court declined to follow this approach in *Donovan* v. *Richland County Association for Retarded*

Citizens, *supra*, because of the Secretary's "simple failure * * * to follow the clear commands of 28 U.S.C. § 1252 and 28 U.S.C. § 1291" (454 U.S. at 390-391; footnote omitted). But in *Donovan*, the Secretary, on appeal, actually sought review of the district court's holding that the Fair Labor Standards Act was unconstitutional as applied. Section 1252 unambiguously provides for a direct appeal in such circumstances. In the instant case, in contrast, even if the Court in the end should disagree with our interpretation of 28 U.S.C. 1252, it cannot be said that Section 1252 contains a comparably "clear command" that a direct appeal be taken to this Court solely on questions of relief. This Court's dismissal of the appeal under 28 U.S.C. 1252 on questions of relief in *Montana Contractors' Association* v. *Kreps*, *supra*, sufficiently refutes any such suggestion.

Moreover, the result in *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, was simply to leave standing a decision that applied only to one institution in a single state. Here, in contrast, the decision of the district court on relief in this nationwide class action—which conflicts with decisions of two courts of appeals and one district court—will bind the Secretary in the nationwide administration of the Social Security Act. See pages 3-4, 6, *supra*. This result should not be visited on the Secretary, the Trust Fund, and the public without an opportunity for appellate review.[30]

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[30] In considering the appropriateness of this disposition, it is relevant that respondents did not move to dismiss the Secretary's appeal to the court of appeals until June 2, 1982, three days after the Secretary's time in which to file a jurisdictional statement docketing the appeal in this Court had expired. See 28 U.S.C. 2101(a).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the court of appeals for consideration of the Secretary's appeal. However, if the Court concludes that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291, the Court should vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal may be taken to this Court pursuant to 28 U.S.C. 1252.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MILDRED M. EDWARDS, ETC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Petitioner has improperly stated the question presented. Petitioner's question begs the issue, for it assumes that the government's notice of appeal filed in the district court sought to appeal only part of this case, and that the decision appealed from did not involve a constitutional question. Respondent suggests that the following is a more appropriate statement of the question presented:

> Whether, when a district court has held an Act of Congress unconstitutional in a civil case where an officer of the United States is a party, any appeal must be directly to this Court under 28 USC § 1252.

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STATEMENT OF THE CASE

Petitioner's (hereinafter the Secretary) description of the case and the rulings of the district court below ignored a number of crucial developments. Since these actions are important for resolution of the jurisdictional issues before this Court, respondent feels compelled to augment her Statement.

1. Respondent filed this case as a nationwide class action challenging the constitutionality of section 211(a)(5)(A) of the Social Security Act, 42 USC §411(a)(5)(A), and seeking to halt the Secretary's continued use of that provision. Although two courts had held the statute unconstitutional prior to the filing of the complaint, *Carrasco v. Secretary of HEW*, 628 F.2d 624 (1st Cir. 1980); *Becker v. Harris*, 493 F.Supp. 991 (E.D. Cal. 1980), neither case had been a class action and the Secretary "continued to apply the challenged section." (Dist.Ct.Memo. Decision and Order, Jan. 22, 1982, Pet.App.6a n.2.)[1]

2. In light of the rulings in *Carrasco*, *Becker*, and *Hester*, the district court, at its first status conference on January 19, 1981, urged the parties to attempt to settle the case. The parties agreed to try and resolve both the class issues and the

[1]The Secretary implies that the unconstitutionality of the statute was fully resolved at the time the complaint was filed, and that the government had already conceded that point. That is not true. Not only did the Fifth Circuit render another decision on this issue a month after the filing of the complaint herein, *Hester v. Harris*, 631 F.2d 53 (5th Cir. 1980), but the Secretary was still fighting *Carrasco*, having filed a petition for rehearing which was not denied until December 4, 1980.

More importantly, the Secretary's formal decision to acquiesce in the *Becker* ruling did not occur until July, 1981, *after* the district court in this case had certified a nationwide class and granted summary judgment for that class on the issue of liability (see Order of May 22, 1981, Pet. App., at 3a-4a).

standards to be applied to determine the social security benefits of the class members. Only after 4 months of negotiations failed to produce any results did the district court proceed with ruling on plaintiffs' motions for partial summary judgment and class action, and the Secretary's motion to remand.

3. Recognizing, as the Secretary acknowledged in her answers to discovery, that since *Carrasco, Hester* and *Becker,* "no final regulations or policies have been issued regarding section 211(a) (A) (vi) of the Social Security Act," the district court again, after its Order of May 22, 1981, asked the parties to meet to resolve the outstanding issues. In a Joint Status Report filed in July, 1981, the parties informed the court that they could not agree on what standards were constitutionally required for determining the class members' benefits. As a result, the court set a briefing schedule which culminated in the Memorandum Decision and Order of January 22, 1982. (Pet.App., at 5a-12a.)

4. The January 22, 1982 Order explicitly concerned the constitutionally required relief which was to be afforded the plaintiff class members. The district court noted that it was faced with a recalcitrant agency which continued to apply the unconstitutional statute even after *Carrasco, Hester,* and *Becker,*[2] Pet.App., at 6a n.2, and which "failed" to adopt

[2]The Secretary's continued attempt to use the unconstitutional presumption in section 211 (a)(5)(A) was alluded to again by the Court in its Order of March 19, 1982 (Pet.App., at 13a-15a), and in its Order Re: Motion for Fees entered December 1, 1982. In the latter order, Judge Patel reiterated (at 4):

> "Defendant's concession as to the unconstitutionality of the statute involved in this action did not fully resolve the merits. Despite that concession, defendant continued to apply the statute to new class members and full relief clearly required further litigation on the merits."

new rules after given the opportunity to do so by the *Carrasco* court Thus, based on its constitutional power to " 'minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse,' *Califano v. Wescott,* 443 US 76, 90 (1979)" (Pet. App., at 9a), the court determined the nature of the extension of benefits to be provided to the plaintiff class. The district court then entered a final judgment on March 23, 1982 (Pet.App., at 16a) in favor of plaintiffs, holding the statute unconstitutional and granting the plaintiff class the relief established in its Order of January 22, 1982.[3]

5. The Secretary then appealed from the court's final judgment. (Pet.App., at 17a.) The notice of appeal states that the Secretary is appealing from the "final judgment entered . . . on March 23, 1982." It does not indicate that the Secretary's appeal is limited to any particular claims or issues. The Secretary did not file a notice of appeal to this Court.

Pursuant to an experiment for expediting appeals, the Ninth Circuit then required the Secretary to fill out a civil docketing statement. The statement is nonbinding and was developed to be used as the basis for a conference with a circuit court attorney. The purpose of the system was to adopt reasonable and prompt briefing schedules, set page limits, and weed out improper appeals. It was on this Ninth Circuit form that, for the first time, the Secretary stated she would not defend the constitutionality of the statute on appeal, but would contest the extension of benefits ordered by the district court as relief.

Respondents then timely filed their motion to dismiss con-

[3]As the Secretary has pointed out, the district court also issued an additional Order on March 19, 1982 (Pet. App., at 12a), clarifying the January 22, 1982 Order, prior to entering a final judgment.

tending that the government had a right to appeal the district court's judgment to this Court under 28 USC §1252 and that, therefore, the Court of Appeals had no jurisdiction over the Secretary's appeal pursuant to 28 USC §1291. *Donovan v. Richland County Association for Retarded Citizens,* 102 S.Ct. 713 (1982). The Ninth Circuit agreed and dismissed the appeal.

SUMMARY OF ARGUMENT

1. A. Unlike other direct review provisions, 28 U.S.C. §1252 was intended to project an expansive view of this Court's mandatory docket. That Congress intended this is supported by three factors. First, the provision permits "any party" to seek direct review. Secondly, it does not narrowly limit the kinds of district court orders which can be reviewed. Thirdly, it does not restrict review to constitutional issues, but provides that all issues on appeal are to be considered by this Court. Relying on these aspects of the provisions, this Court has consistently applied a broad reading of §1252.

B. This Court's expansive interpretation of §1252 has recognized that Congress was motivated by a concern with the impact on the administration of federal programs when a statute is held unconstitutional. Thus, the remedy is an integral component of the district court's ruling, and the relief ordered cannot be separated from the holding of unconstitutionality. In this instance, the relief is the extension of benefits to the class disfavored by the challenged statutory scheme, and this Court has previously recognized the constitutional implications inherent in this form of relief. Consequently, even under the Secretary's restrictive view of §1252, the constitutional issues implicated in the relief require direct review by this Court.

C. Section 1252 unambiguously establishes four factors which must be satisfied for direct review in this Court. Incorrectly relying on the more restrictive view of other direct appeal provisions, however, the Secretary adds a fifth prerequisite, that the review sought be of the holding of unconstitutionality. This reading is not supported by the language of the provision. It also contradicts this Court's consistent recognition of the broad nature of § 1252. In at least two cases, this Court has recognized jurisdiction of appeals which do not comply with the Secretary's proposal.

The Secretary's effort to bolster her argument by reference to the second paragraph of § 1252 proceeds from the incorrect premise that the only appeals which could be pending in a Court of Appeals, and thus potentially subject to the second paragraph, are those which derive from an order holding an Act of Congress unconstitutional. In fact, though, appeals on non-constitutional rulings prior to the ruling of unconstitutionality could well be pending; the second paragraph was designed to avoid splitting appeals and to bring the entire case, including the non-constitutional issues, before this Court. There is no validity, therefore, to the Secretary's assertion that the second paragraph was designed only to provide a mechanism to handle appeals related to the holding of unconstitutionality. Congress contemplated that non-constitutional issues would be presented to this Court pursuant to § 1252.

The legislative history provides no support for the Secretary. The background of this provision, especially the late amendments to it, render the discussions in the House unpersuasive as authority, and suggest, if anything, Congress' desire to construct a direct review statute which would ensure that the whole case came to this Court.

Further damaging to the Secretary's effort to rewrite the clear command of § 1252 are the illogical results flowing from her interpretation. As a practical matter, the Secretary delegates to herself the unilateral power to determine to what court an appeal should go. By purporting to challenge the holding of unconstitutionality, even where to do so would be frivolous, the Secretary can bring the case to this Court. By not appealing that aspect of the ruling below, the Secretary can direct the case to the Court of Appeals, as she seeks to do here. The truly significant event, the action of the district court, is ignored in favor of the Secretary's unfettered choice of a forum. The proper focus, however, is on the ruling's impact on the administration of the given federal program; to permit the government to select between appellate forums is nowhere supported by the language or purpose of § 1252.

2. The Secretary has alternatively argued that, if this Court agrees with respondent, it should order the judgment below vacated so that she may timely appeal to this Court. No good cause exists for such an action. This Court emphatically described the obligations of government officials to proceed to the Supreme Court under § 1252 before the notice of appeal was filed in their case. The Secretary's failure to follow that mandate is inexcusable; if she had any doubts, she could have noticed appeals in both courts. If would be unjust and confusing to undo the benefits which have flowed to the respondent class pursuant to the district court's judgment.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT HAVE JURISDICTION OF THE SECRETARY'S APPEAL UNDER 28 USC §1291 SINCE THE SECRETARY COULD HAVE APPEALED DIRECTLY TO THIS COURT UNDER 28 USC §1252.

A. The Uniquely Broad Jurisdictional Grant of Section 1252 Distinguishes it From Other Direct Appeal Provisions and Stands in Contrast to the General Effort to Limit this Court's Mandatory Docket.

The Secretary is seeking review in the Court of Appeals, pursuant to 28 USC §1291, of the district court's summary judgment holding an Act of Congress unconstitutional. There is no dispute, however, that the Court of Appeals has no jurisdiction under §1291 "where direct review may be had in the Supreme Court". Indeed, just *before* the government filed its notice of appeal herein, this Court, in a *per curiam* decision, reiterated that if a direct appeal lies to the Supreme Court under 28 USC §1252, it "serve[s] to deprive the Court of Appeals of jurisdiction . . . [under] 28 USC §1291." *Donovan v. Richland County Association for Retarded Citizens, supra* at 713.

In *Donovan,* the Court also noted that Congress had set forth "clear commands" in support of an expansive view of the court's mandatory docket when it adopted §1252. 102 S.Ct., at 714. Thus, this Court recognized that section 1252 is unique among the direct appeal statutes enacted by Con-

gress.[4] First, section 1252 allows "any party" to appeal, thus establishing the broadest possible pool of potential appellants. Appeals are not limited to either the party defending the constitutionality of the statute or the federal government. See *Regan v. Taxation with Representation of Washington*, _____ US _____, 103 S.Ct. 1997, 1999-2000 n.3 (1983).[5]

Second, § 1252 contains no limitation on the nature of a given district court order which may be appealed. The appeal may be from "an interlocutory or final judgment, decree or order." By contrast, § 1253 is limited to review from decisions on injunctions, while § 1254 and § 1257 only apply to final judgments.

Third, and most important, § 1252 review is not limited to constitutional issues. The second paragraph of § 1252, to which there is no corollary in the other direct appeal statutes,

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[4]There are three other direct appeal provisions. 28 USC §§ 1253, 1254(2), and 1257(1) and (2). Section 1253 provides review of decisions of three-judge district courts. Since 1976, three-judge district courts have been virtually eliminated (P.L. 94-381); however, in those rare circumstances where they are required direct review may be obtained in this Court. Section 1254 provides review from courts of appeals by the party relying on a state statute which has been held unconstitutional by the appellate court. Appellate review under § 1254(2) is limited to "the federal questions presented." Section 1257(1) and (2) permits direct appeal from decisions of the highest court of a state when a state or federal statute is held unconstitutional. See Brief for Petitioner, at 25-26 n.18.

[5]Section 1252 is applicable only if the government is a party, but the government need not be the appellant. The government can be an original party or it may have intervened in the suit pursuant to 28 USC § 2403. The obligation to notify the attorney general when the constitutionality of a federal statute is at issue and the right of intervention were adopted by Congress in conjunction with § 1252. Act of Aug. 24, 1937, Ch. 754, 50 Stat. 751 *et seq.* The original version of the Act of 1937 limited direct appeals to the attorney general. See Brief of Petitioner, at 29-30 n.20. The limitation was removed by the Senate. 81 Cong.Rec. 8514.

calls for *all* other issues that are raised by the parties on appeal to be "treated as taken directly to the Supreme Court." As the Secretary concedes, "§ 1252 brings before [the Supreme Court] not only the constitutional question, but the whole case . . . ." *McLucas v. DeChamplain,* 421 US 21, 31 (1975) (citations omitted). See Brief of Petitioner, at 22 n.14.

Relying on the unique and "clear commands" of § 1252, this Court has recognized that the statute must be interpreted broadly. The purpose of Congress was "to afford immediate review in this Court in civil actions to which the United States or its officers are parties, and thus will be bound by a holding of unconstitutionality." *McLucas, supra,* at 31. Consequently, as this Court ruled again last year, "§ 1252 was an *unambiguous* exception to the policy of minimizing the mandatory docket of this Court." *California v. Grace Brethren Church,* US , 102 S.Ct. 2498, 2506 (1982) (emphasis supplied), citing *McLucas v. DeChamplain,* 421 US 21 (1975).[6] It thus cannot be compared to other direct appeal statutes such as § 1253, where the policy of restricting direct appeals influences the statutory interpretation.[7] See also *Donovan v. Richland County Association for Retarded Citizens, supra.*

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[6]Indeed, Rep. Summers, the chief supporter in the House of Representatives of the 1937 Act, noted that the House Committee had considered whether the statute would overburden the Supreme Court, but had decided the need for appellate review was important enough to risk overextending the court. 81 Cong.Rec. 3256.

[7]See, e.g., *Gonzalez v. Automatic Employees Credit Union,* 419 US 90 (1974).

B. The Remedy Adopted by the District Court is Itself an Intrinsic Aspect of the Constitutional Ruling and is Therefore Necessarily Subject to Review Pursuant to Section 1252.

This Court has carried out the intent of Congress by adopting a broad definition of what constitutes a district court holding that an Act of Congress is unconstitutional. All that is required to invoke § 1252 is that the "ruling of unconstitutionality [be] made in the application of the statute to a particular circumstance . . . ." *Fleming v. Rhodes*, 331 US 100, 102 (1947); see also *United States v. Darusmont*, 449 US 292 (1981). It does not even matter that the lower court "did not expressly declare a federal statute unconstitutional." *Grace Brethren Church, supra*, 102 S.Ct., at 2506.

In *Grace Brethren Church*, it was a state, not a federal, statute that was found unconstitutional. Since the state statutory scheme was so intertwined with the federal law, the district court's decision had the effect of stifling federal administration of the program.

> "§ 1252 provides jurisdiction . . . so long as a determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' . . . *United States v. Clark*, 445 US 23, 26 n.2, 100 S.Ct. 895, 899 n.2, 63 L.Ed.2d 171 (1980)." *Grace Brethren Church*, 102 S.Ct., at 2506 (footnote omitted).

As long as the result of the constitutional holding is that the district court alters the operation of the federal statutory scheme, then it is a constitutional ruling covered by § 1252. "That section applies, however the question of constitutionality may arise . . . ." *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 US

243, 249 (1938). This case fits squarely within the definition adopted in *Grace Brethren Church.*

Although the Secretary concedes, as she must, that the district court below declared the federal statute unconstitutional as a "predicate to the relief", she maintains that an appeal contesting that relief is separate from the constitutional question. When a federal statute conferring benefits is challenged, however, the constitutional issue includes not only the validity of the statute but the remedy to be provided those harmed. As Justice Harlan wrote:

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare [the law] a nullity and order its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Welsh v. United States,* 398 US 333, 361 (1970) (Harlan, J., concurring in result).

In *Califano v. Westcott,* 433 US 76 (1979), this Court specifically recognized that the extension/nullification issue must be faced as part of its constitutional ruling. Rejecting Justice Powell's argument in dissent that the question of extension is more properly a legislative matter (see 443 US, at 93-96), this Court explicitly determined the nature of the constitutional remedy that was necessitated by its affirmance of the district court's ruling on the merits.[8]

The "extension/nullification" problem in *Westcott* was

[8]The extension/nullification issue was not unique to *Westcott.* As Justice Blackmun noted, this Court had extended benefits to harmed class members as part of the constitutionally required relief in numerous cases before *Westcott.* See cases cited, 443 US, at 89-90. The issue continues to arise today. See *Heckler v. Mathews,* No. 82-1050, prob. jur. noted, 103 S.Ct. 1425 (1983).

raised in the separate appeal by state officials who agreed that the underlying statute was unconstitutional. The state's only issue was the degree of the extension, for no party argued for nullification. 443 US, at 90-91. This Court held that it had jurisdiction over this "separate appeal . . . pursuant to § 1252." *Id.*, at 83. The impact of the constitutional ruling and the nature of the remedy were not peripheral to the constitutional issue but part of it.[9]

The issue on appeal in this case is nearly identical to the state's appeal in *Westcott*. Both the Secretary and the plaintiffs agreed that benefits should be extended to the class members. The Secretary's dispute here is with the nature of the extension and how far the district court went in determining the constitutional remedy. As in *Westcott*, the only appeal lies to this Court under § 1252 to contest that determination.

The key question is the impact of the district court's constitutional ruling on the federal statutory scheme. Because the federal government was " 'bound by a holding of unconstitutionality' . . . this Court has jurisdiction under § 1252 to hear this appeal." *Grace Brethren Church, supra,* at 2507. The "mandate" of § 1252 is "unambiguous". *McLucas v. DeChamplain, supra,* at 31.

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[9]The Secretary may contend that jurisdiction over the state's appeal in *Westcott* was premised on the second paragraph of § 1252, since the federal government had already filed an appeal contending that the underlying statute was constitutional. See 443 US, at 83. But this Court expressly described the state's appeal as "separate" from the Secretary's, *id.*, at 83, and in light of this Court's recent observations about the "broad" language of the first paragraph of § 1252, *Regan v. Taxation with Representation of Washington, supra,* 103 S.Ct., at 1999 n.3, the more consistent conclusion is that the first, not the second, paragraph provided jurisdiction over the state's extension/nullification appeal.

C. The Secretary's Position is Contradicted by the Express Language of the Statute and by the Illogical Results Flowing From That Position.

The "clear commands" of § 1252 are set forth directly in the statute. On its face, it establishes four prerequisites for a direct appeal:

a. The order being appealed must be from one of the enumerated courts;
b. An Act of Congress must be held unconstitutional;
c. The proceedings must be civil;
d. The United States, or an agency, or officer thereof, must be a party. 12 Moore's Federal Practice § 411.11.

Even the Secretary agrees that this case fits squarely within those rules. When the "literal requirements of § 1252 are satisfied", this Court has jurisdiction. *Williams v. Zbaraz*, 448 US 358, 366 (1980).

The Secretary, however, argues that § 1252 entails a fifth requirement: that the appellant be seeking review of the district court's holding that an Act of Congress is unconstitutional. See Brief of Petitioner, at 15-41. The Secretary's position reflects both her attempt at rewriting the language of § 1252, and an effort to apply policies applicable to the other direct appeal provisions to § 1252.[10]

[10]The Secretary premises her entire argument on the theory that direct appeal statutes should be restrictively interpreted in order to minimize this court's appellate docket. See, e.g., Brief of Petitioner, at 18-19. As noted earlier, however, this Court has repeatedly held that Congress designed § 1252 as "an unambiguous exception to the policy of minimizing the mandatory docket of this Court." *Grace Brethren Church, supra*, at 2506.

Bread Political Action Committee v. Federal Election Committee,

The Secretary begins, as she must, "with the language of the statute itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 US 176, 187 (1980). She contends that, because a constitutional ruling is a necessary predicate to a §1252 appeal, the issue appealed must be that same constitutional question. The Secretary's reading of the language of §1252 is unsupportable, however; there are no words in §1252 even suggesting that it is solely intended for constitutional issues. On the contrary, as previously noted, §1252 is unique among direct appeal statutes because it specifically mandates in its second paragraph that the Court consider all non-constitutional issues. When Congress intends to limit appeals to certain types of questions, it has explicitly said so. See, *e.g.*, 28 USC §1254 (2).

The Secretary's statutory analysis is also inconsistent with both *Regan v. Taxation with Representation of Washington, supra,* and *McLucas, supra.* In the former, this Court explicitly allowed the plaintiff below to appeal under §1252 a ruling by the district court *upholding* the constitutionality of the challenged statute. 103 S.Ct., at

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102 S.Ct. 1235 (1982), which the Secretary cites to support her policy argument, actually supports respondent's position. In that case, this Court upheld, in the absence of any clear evidence to the contrary, a literal interpretation of the Federal Election Campaign Act of 1971 (FECA), 2 USC §437h. Because the text was "plain[ ] enough" and had an "obvious meaning", 102 S.Ct., at 1238, the Court refused to read an additional party into the enumerated categories.

Respondent here also urges a literal interpretation of §1252, and that this Court follow the "clear commands" of Congress. Although a literal interpretation of §1252 may result in a modest expansion of this Court's appellate docket, as opposed to the restrictive result from the literal interpretation of the FECA, that is consistent with Congress' intent. *Grace Brethren Church, supra; McLucas v. DeChamplain, supra.* "[I]t would do violence to the purpose of Congress . . . to interpret §1252 restrictively." *Reid v. Covert,* 351 US 487, 490 (1956).

1999 n.3. Following past decisions which demand a literal interpretation of § 1252, this Court found the first paragraph of the statute "broad enough" to encompass such an appeal. *Id.*, at 1999-2000 n.3.[11]

The Secretary attempts to ignore the impact of *Regan* by claiming that because the ultimate issue in the plaintiffs' cross-appeal was a constitutional one, it was covered by § 1252. Nevertheless, *Regan* totally undercuts the Secretary's strained view of § 1252's language. See Petitioner's Brief, at 20-22. If, as the Secretary claims, the first paragraph of § 1252 "directly link[s] the right to appeal with the holding of unconstitutionality" (Pet.Brief, at 20), then the appeal by the plaintiffs in *Regan* from an unsuccessful and separate constitutional challenge would not be possible.

Regan, thus, reaffirms this Court's commitment to a literal, and therefore expansive, interpretation of § 1252's requirements.

Similarly, the Court's earlier analysis in *McLucas* belies the Secretary's proposed interpretation of § 1252's language. In *McLucas*, the constitutional issue, already resolved in another case,[12] was held to be "insubstantial", and not sufficient to convene a three-judge district court. 421 US, at 32.

Despite the fact that no constitutional issue was before the Court, Justice Powell found jurisdiction under § 1252 to resolve a claim of access to court-martial documents which was "independent" of the constitutional issue and "unrelated to the validity and interpretation of . . . any other Act

[11]Although Justice Rehnquist could easily have premised his analysis on the second paragraph of § 1252 (which the Secretary has suggested would have been the proper reasoning), his reliance instead on the first paragraph emphasizes the importance of his conclusion.

[12]*Secretary of Navy v. Avrech*, 418 US 676 (1974).

of Congress . . . ." *Id.*, at 33. Under the petitioner's interpretation, which demands that the appellant raise a constitutional issue, this result would not be possible.

The Secretary's view of the import of the second paragraph of § 1252 is equally faulty (see Pet.Brief, at 23-26). The intention of the second paragraph is to insure, unlike other direct appeal statutes, that *all* issues in the case will be before the Supreme Court. By employing such broad language, Congress assured that nothing would fall through the cracks and that its intentions were satisfied.

The Secretary's interpretation begins with a flawed premise, and proceeds to an irrational conclusion. Without explanation or support, she assumes that any appeal covered by the second paragraph of § 1252 must derive from an order holding an Act of Congress unconstitutional. Since the second paragraph presumes that some appeals do belong in the Court of Appeals, she argues that § 1252 divides cases where district courts have struck down federal statutes into two categories — one where appeal is proper in the Supreme Court, and the other where appeal is proper in the circuit court. The Secretary concludes that the only difference must be that in appeals to the Supreme Court the underlying constitutional issue has been raised. See Brief for Petitioner, at 23-26.

The Secretary's analysis neglects to consider that the prior circuit court appeals discussed in the second paragraph of § 1252 refer to appeals taken before the district court's constitutional ruling. For example, an interlocutory appeal under 28 USC § 1292(b) might be pending on a class issue in the Court of Appeals when the district court subsequently holds an Act of Congress unconstitutional. If a § 1252 appeal is then taken from the constitutional ruling, the § 1292(b) class issue would be an appeal "taken to . . .

[an]other court prior to such notice [under § 1252]".

Montana Contractors' Association v. Kreps, 442 US 935 (1979), does not stand for the contrary position. As a summary action by this Court, its precendential value is limited. *Mandel v. Bradley*, 432 US 173, 176 (1977); see also *id.*, at 179-180 (Brennan, J., concurring). This is especially true given its complicated procedural developments,[13] and the subsequent decisions of this Court where § 1252 has been extensively discussed. See, *e.g.*, *Grace Brethren Church, supra.*

Furthermore, the issue which the plaintiffs sought to appeal stemmed from the decision of the district court on a procedural matter — a motion to amend the complaint to order money damages. Those questions were not part of the results of the court's holding that a federal statute was unconstitutional; therefore, an appeal was proper to the Court of Appeals under § 1291. It could only have been heard directly in this Court under the second paragraph of § 1252 following a proper appeal from the constitutional ruling. On the other hand, when money damages are awarded by the lower court as part of its constitutional ruling, a proper appeal does lie under § 1252. *U.S. v. Clark, supra.*

The Secretary tries next to bolster her argument by looking to the legislative history of § 1252, despite the fact that nothing in the legislative history specifically addresses the

[13]For example, the Secretary's discussion of *Montana Contractors' Association* neglects to mention that the government had also filed a notice of appeal under § 1252. Given the government's appeal even the Secretary would have to concede that the plaintiffs' subsequent appeal was properly filed in this Court under § 1252. However, after the government decided not to perfect its § 1252 appeal, this Court, without explanation, then dismissed plaintiffs' appeal. See discussion in Motion of Federal Appellees to Dismiss or Affirm in No. 78-1546.

question now before the Court. The Secretary's attempt to find congressional support for imposing a requirement that all § 1252 appeals must include the merits of the constitutional question is but wishful thinking.

> "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted . . . . Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did . . . but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham,* 436 US 618, 625-26 (1978).

In addition, the legislative history of this provision must be viewed with skepticism. First, the Act of Aug. 24, 1937 was not limited to one issue. In addition to providing direct appeals from some district court rulings (Sec. 2), it also required notice and an opportunity to intervene to the attorney general when a federal statute is challenged as unconstitutional (Sec. 1), and the convening of three-judge district courts when injunctions were sought against federal statutes (Sec. 3). It is often hard to isolate which of the elements of the Act of 1937 is referred to in the legislative history. It does appear, though, that most of the discussions in Congress centered on section 1 of the Act. See 81 Cong.Rec. 3254-3264.

Furthermore, two of the key elements of § 1252 were not part of the original bill. As the secretary has noted, the original House provision allowed only the government to file a direct appeal and did not include the second paragraph of § 1252. The House debates, therefore, focused on the House version of the bill — which was not enacted.[14] The Sec-

[14] In fact, even the direct appeal portion of the Act of Aug. 24, 1937, § 2, was not part of the original House bill. The remarks of Rep. Summers sug-

retary's argument would certainly be more plausible if § 1252 limited the right of appeal only to the attorney general, and did not require the Court to consider the whole case on appeal. Since the attorney general's participation in a case was tied to the constitutional issue, the earlier version of § 1252 may have suggested a more limited direct appeal.

With little debate on the amendments, however, the Senate made two critical changes eventually agreed to by the House. First, appeal was permitted by "any party", thus eliminating the alleged tie between the appellant and the constitutional issue. Second, and more importantly, the second paragraph was inserted, reflecting Congress' desire to have the Supreme Court determine more than the constitutional issues. The early House debates are simply not relevant or useful for interpreting the final version of § 1252. "Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 US 102, 108 (1980).

To the extent that the legislative history of § 1252 has any meaning for this case, it merely reflects Congress' concern over the impact of district courts' constitutional rulings on federal statutes. Congress desired to minimize the ability of district courts to interrupt federal programs without prompt review in the Supreme Court and participation of the attorney general. Congress was not solely concerned with the constitutional issue, but, rather, with a broader problem

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gest that it was understood that a § 2 allowing only the attorney general a direct appeal in the Supreme Court would be added. 81 Cong.Rec. 3254. An amendment to the bill providing such a limited direct appeal passed with virtually no opposition prior to House passage of the bill. 81 Cong.Rec. 3272.

implicated by a holding of unconstitutionality: the impact on federal officials and the programs under their administration. If the district court was to be able to direct the operation of the federal program, then the government, or the affected party, would be able to have the "whole" case heard as expeditiously as possible in this Court. Thus, if a district court decision holding a federal statute unconstitutional defined how the federal program would be run, it substantially impaired that program and "bound" the government to the effects of the constitutional ruling. These decisions, Congress decided, should be appealed under § 1252. *California v. Grace Brethren Church, supra.*

Finally, the Secretary's proposed limitations on § 1252 make little sense as a practical matter. The Secretary does not dispute that the district court below held a federal statute unconstitutional. Nor does she contend that the fact that other federal courts have also held the statute unconstitutional should affect the appealability of the district court's ruling. Indeed, the Secretary argues that even if the constitutional issue had been previously resolved by *this* Court, an appeal could still lie under § 1252. See Petitioner's Brief, at 36-40.

> "An appeal under § 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional in a civil action in which the United States is a party, not just for the first such decision." *United States v. Clark, supra,* 445 US, at 25 n.2.

Thus, even the Secretary contends that the reasoning in *Denberg v. United States Railroad Retirement Board,* 696 F.2d 1193, 1195 (7th Cir. 1983), is faulty. Petitioner's Brief, at 36-41.

In effect, the Secretary proposes an appellate scheme under § 1252 which depends solely on the whims of the

appellant. Even if the appellant's constitutional argument is frivolous or insubstantial, direct review may be had in this Court as long as the appellant claims to be contesting the constitutional issue.[15]

For example, under the Secretary's rationale, the government could have appealed the district court decision in *Denberg* directly to this Court under § 1252 if it purported to contest the underlying constitutional issue. This would be possible even though this Court had just determined the invalidity of the same statutory provision in *Railroad Retirement Board v. Kalina*, 431 US 909 (1977), because, as the Secretary urges, "jurisdiction under 28 USC 1252 . . . cannot turn on . . . the degree to which the lower court's . . . determination of unconstitutionality was dictated by precedent." Petitioner's Brief, at 39.[16]

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[15]Furthermore, since the government has the unbridled and unilateral ability to contest a constitutional holding which has already been resolved adverse to it even in this Court, the government, under the Secretary's own logic, possesses an unchallengeable right to go either to the Court of Appeals or this Court in every instance. But this very right to proceed in this Court

> "serve[s] to deprive the Court of Appeals of jurisdiction, . . . for 28 USC § 1291 provides that '[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States . . . except where a direct review *may* be had in the Supreme Court.' " *Donovan v. Richland County Assn. for Retarded Citizens, supra*, 102 S.Ct., at 713 (emphasis supplied).

In short, the logical implication of the Secretary's own reading of § 1252 is to place this case squarely within the controlling parameters of *Richland County*.

[16]The reason such an appeal might be filed is to allow this Court to determine whether or not the district court had jurisdiction — the main issue in *Denberg*, 696 F.2d, at 1194-1198. Section 1252 gives this Court power to determine the district court's jurisdiction. *McLucas v. DeChamplain, supra*.

It is absurd, however, to suggest that Congress intended § 1252, and its companion provision in § 1291, to provide a mechanism for appellate forum-shopping. It is also not logical for the proper appellate tribunal to be determined by decision of the appellant as to what issues should be argued, rather than the contents of the district court order. The structure of § 1252 suggests that Congress sought to provide a special avenue of appeal when a district court acted in a specified manner — not when a party made a particular claim.[17]

Further, the Secretary's proposition permits the same issue to be appealed directly to this Court over and over again. For example, the secretary could have appealed the partial summary judgment entered by the district court on May 22, 1981 (Pet.App. 3a-4a) under § 1252, and on remand, after this Court affirmed that ruling, the district court would have followed up with the January 22, 1982

[17]The difficulty of the Secretary's new test is further illustrated by the developments in this case. Although the Secretary did not support the challenged statute's constitutionality in the district court, she could have done so on appeal. See *U.S. v. Clark, supra.*

The Secretary's notice of appeal herein does not indicate what is appealed; presumably, had the government intended to contest the underlying statutory issue, it would have filed the identical notice of appeal. Under the Secretary's analysis, in most cases, the propriety of the notice of appeal could not be determined until briefs were filed. In this case, jurisdiction was determined solely by the Ninth Circuit's docketing statement. Respondent cannot believe that Congress intended Supreme Court jurisdiction to turn on the contents of a docketing statement which is not even required by federal rules or law.

If any line needs to be drawn limiting § 1252 appeals, it must focus on the impact of the district court's order holding a federal law unconstitutional. As long as the district court either directly or indirectly interrupts the federal statutory scheme devised by Congress on constitutional grounds, any appeal must be brought directly to this Court.

Order on constitutionally required relief (Pet. App. 5a-12a). Under the Secretary's rationale, the critical factor on whether another § 1252 appeal would lie is whether the government wishes to raise again (however specious) the constitutional question. If so, this Court would be required, under the Secretary's analysis, to hear the same issue on direct appeal a second time.

Whether appeals are covered under § 1252 must be determined by the actions of the district court, not the strategy of the appellants. Congress has carefully and unambiguously set forth specific requirements for when direct appeals are proper. As Justice Stevens recently observed:

> "[E]xperience teaches that strict adherence to the procedural requirements specified by the legislation is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver,* 447 US 807, 826 (1980).

II.

THERE IS NO REASON FOR THIS COURT TO VACATE THE JUDGMENT OF THE DISTRICT COURT BELOW.

In a final effort to extricate herself from the "unambiguous mandate" of § 1252, the Secretary argues that this Court should re-open the district court judgment so that she may file a timely appeal to this Court under § 1252. Brief of Petitioner, at 41-42. Her request is based on her continued belief that the requirements of § 1252 were not clear at the time that the district court entered its final judgment.

This Court has emphatically ruled, however, that it will

not continue to rescue the government when it fails to follow the proper avenue of appeal under § 1252. *Donovan v. Richland County Association for Retarded Citizens, supra.* As in *Richland County,* the alleged difficulties in this case stem from "the government's simple failure . . . to follow the clear commands of 28 USC § 1252". *Id.*, at 714. There is no excuse for the government repeating that error only three months after this Court explicitly described the effect of § 1252 and declined to order the judgment vacated in that case.[18]

[18] The Secretary could easily have protected her position by following the standard practice of filing two notices of appeal — one to this Court under § 1252, and one in the Ninth Circuit under § 1291. See, *e.g.*, Jur. Statement in *McLucas v. DeChamplain,* No. 73-1346.

Furthermore, vacating the district court's judgment could cause substantial harm to the respondent class members because the Secretary did not seek a stay of the court's Jan. 22, 1982 order, and the relief granted has been implemented. In fact, the district court entered an order on February 11, 1983 requiring all benefit eligibility determinations to be completed by August 6, 1983. Vacating the district court's final judgment is likely to cause confusion as to the government's obligation to continue paying these benefits and corresponding harm to the class members who have rightfully relied upon that obligation.

CONCLUSION

The judgment of the Court of Appeals dismissing the Secretary's appeal for lack of jurisdiction should be affirmed.

Respectfully submitted,

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No. 82-874

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-874

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent argues that the issue of relief is an intrinsic aspect of the district court's constitutional ruling, and so is appealable to this Court even in cases where all parties acquiesce in the court's holding that a statute is unconstitutional. She also contends that, even if that is not so, the issue of relief is nonetheless appealable to this Court because of its "impact on federal officials and the programs under their administration" (Br. 20). Tying the right of direct appeal to a challenge to the holding of unconstitutionality, she suggests, will lead to undesirable appellate forum-shopping by the government. Re-

spondent finds support for these contentions in *Regan* v. *Taxation With Representation*, Nos. 81-2338 & 82-134 (May 23, 1983). These contentions are without merit.[1]

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[1] Respondent's counterstatement of the facts (Br. 1-3 & nn. 1-2) conveys the impression that the Secretary, while verbally conceding the unconstitutionality of 42 U.S.C. 411(a)(5)(A), nevertheless continued to apply it in disregard of prior judicial decisions. This is misleading. *Carrasco* v. *Secretary of HEW*, 628 F.2d 624 (1st Cir. 1980), was decided on June 11, 1980. *Becker* v. *Harris*, 493 F. Supp. 991 (E.D. Cal. 1980), was decided on July 17, 1980. On September 30, 1980, the Attorney General formally notified the Speaker of the House and the President of the Senate that the government would not appeal from the decision in *Becker*. 126 Cong. Rec. H10562 (daily ed. Nov. 12, 1980). (We have reproduced a copy of that notice at App., *infra*.) This action was filed three weeks later, on October 20, 1980. On January 16, 1981 the Secretary moved to remand the case to the agency because "[j]udicial precedent has established that 42 U.S.C. § 411(a)(5)(A) * * * is unconstitutional; the Secretary * * * should no longer be enforcing that provision in cases similar to" respondent's (Memorandum in Support of Defendant's Motion to Remand 3). On April 14, 1981 the Secretary instructed local district offices that they were to abide by the decision in *Becker* for all taxable years that included the month of October 1980. (Joint Status Conference Certificate of the Parties' Counsel, Exh. C (filed Dec. 3, 1981)). On April 23, 1981 the government filed an affidavit in this action designed to allay respondent's fears that the Secretary might not voluntarily apply the *Becker* decision to other beneficiaries. It stated that "[t]he Secretary * * * acquiesces in the holding of the Court in *Becker* * * * that 42 U.S.C. § 411(a)(5)(A) is unconstitutional. The Secretary will no longer apply the provisions of [that section]" (Affidavit of Harris G. Factor). These actions all preceded the district court's May 22, 1981 grant of summary judgment on the issue of liability (Pet. App. 3a-4a).

Respondent points to several comments made by the district court as evidence that the Secretary repudiated these un-

1.a. The linchpin of respondent's position is the erroneous assertion (Br. 10-12) that the issue of relief is "an [i]ntrinsic [a]spect of the [c]onstitutional [r]uling" and is therefore reviewable only in this Court under 28 U.S.C. 1252. In fact the issue of relief in a case such as this is neither a constitutional question nor determined in any necessary way by the holding that an act of Congress is invalid. It instead involves considerations of legislative intent and equitable discretion, and accordingly is most properly reviewable in the first instance in the courts of appeals.

It is true that the district court, as a *consequence* of holding a statute unconstitutional, must address the question of relief. But the nature and extent of the remedy in an equal protection case such as this is an issue quite distinct from the constitutional question. It is essentially a matter of discerning what Congress would intend, given the knowledge that its preferred approach could not be employed. For that reason, Congress may itself provide a statutory answer to the question of relief by writing into the law a contingent rule, to be implemented in the event of a holding of unconstitutionality. See Appellant Br. at 43-51, *Heckler* v. *Mathews*, prob. juris. noted, No. 82-1050 (Mar. 21, 1983).[2] Even where Congress does

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equivocal statements of acquiescence (Br. 1, 2 n.2). The comments to which respondent refers (Pet. App. 6a n.2, 13a-15a; Resp. Br. 2 n.2), however, addressed the Secretary's insistence: (i) that the relief granted under the new standard—with which she agreed—should not include amendment of earnings records back to 1950; and (ii) that the class should not be open-ended, so that the Department could apply to nonmembers the same standards used in non-community property states.

[2] We have sent respondents' counsel a copy of our brief and reply brief in *Mathews*.

not adopt that optimal solution, it may give strong indications about the remedial approach it prefers. See *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 11; *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979) ("The presence in the Social Security Act of a strong severability clause * * * evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality.").

That the issue is one of legislative intent rather than constitutional command may also be seen from this Court's treatment of parallel cases where it has held state laws invalid on equal protection grounds. In such cases the Court has consistently held that any number of alternative approaches for remedying the statutory defect are equally permissible, constitutionally speaking.[3] The Court has also made clear that the choice among the various alternatives is one to be made by the state itself, either through its courts or—if it prefers—through new legislation.[4]

Thus, rather than being a "constitutional issue" (Br. 11 & n.8), as respondent contends, the question of relief is instead like problems of statutory construction that the courts of appeals regularly confront under 28 U.S.C. 1291. A court considering the question of relief must ask whether the act specifically

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[3] See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 272 (1979); *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976); *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942). See also *Welch* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

[4] See, *e.g.*, *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 153 (1980); *Orr* v. *Orr*, 440 U.S. at 272; *Craig* v. *Boren*, 429 U.S. at 210 n.24; *Stanton* v. *Stanton*, 421 U.S. at 18; *Skinner* v. *Oklahoma*, 316 U.S. at 543.

addresses the possibility that one portion may be held unconstitutional, and if it does not, how the larger purposes of the act can best be served after one portion is stricken.[5] Those issues may be significant (as are many questions of legislative intent), but they are different from the issue of unconstitutionality. A holding of unconstitutionality necessarily frustrates the will of Congress. But once it is agreed that a specific section cannot stand, the court's choice of remedy may well be consistent with Congress's preferred solution to a conceded defect in the law. And because the remedy chosen may be entirely consistent with what Congress would want, there is no reason to insist on immediate review by this Court in every case. The better solution, and the one adopted in 28 U.S.C. 1252, is to allow review of right in the courts of appeals, and leave open the possibility of discretionary review by this Court pursuant to 28 U.S.C. 1254(1) in the event the remedy finally chosen *does* frustrate Congress's purpose in a matter of some importance.

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[5] This Court has also suggested that where the issue of Congress's intent is quite uncertain, the courts may exercise a degree of equitable discretion in crafting an appropriate remedy. See *Califano* v. *Westcott*, 443 U.S. at 90 ("The District Court ordered extension rather than invalidation by way of remedy here, and equitable considerations surely support its choice"), 93 ("the most equitable extension possible"). Because the issue of congressional intent is, as it were, at one remove, such discretion is both necessary and desirable. But just as it is unnecessary to have review of right in this Court of questions of statutory construction, so too it is hard to justify direct appeals under Section 1252 to determine whether the district court has properly exercised its discretion in fashioning a remedy.

b. Respondent's argument that Section 1252 requires a direct appeal of any issue that somehow depends upon the holding of unconstitutionality would have the unfortunate consequence of enlarging this Court's mandatory docket to include a host of cases that properly belong, at least in the first instance, in the courts of appeals. Whether the plaintiff is entitled to attorney's fees, for example, will depend upon whether his claim of unconstitutionality prevailed, and on whether "the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). But Section 1252 should not be read to require review by this Court of the award or amount of attorney's fees.[6]

Similarly, the question whether valid portions of a statute are severable is one that must be decided

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[6] In this case the government appealed the district court's November 24, 1982 order awarding attorney's fees to the Ninth Circuit. *Heckler* v. *Edwards*, No. 83-1652 (9th Cir.). Proceedings have been stayed until January 26, 1984, or until shortly after the decision in this case. The government has also docketed an appeal in *Donovan* v. *Blitz*, No. 83-2027 (D.C. Cir.), challenging an award of attorney's fees in a case where the district court had earlier ruled that the Daniel Amendment was unconstitutional. 538 F. Supp. 1119 (D.D.C. 1982), vacated and remanded with instructions to dismiss as moot, No. 82-611 (Jan. 10, 1983).

We note that such nonconstitutional issues as the award or appropriate amount of attorney's fees might be difficult for this Court to dispose of summarily. For unlike all other appeals to this Court, appeals under 28 U.S.C. 1252 would come from a single trial level judge (contrast 28 U.S.C. 1253, 1254(2), 1257(1), (2)) whose conclusions would have been subjected to no scrutiny at the same or any other level of the judiciary. Fairness to the parties in those circumstances might require more thorough consideration than is necessary in other cases within the Court's mandatory jurisdiction.

after part of the act has been held unconstitutional. That issue may occur with some frequency in the wake of this Court's decision in *INS* v. *Chadha*, *supra*. As we explain below (note 16), severability is simply a question of congressional intent, and a district court's decision on that issue—unlike its holding of unconstitutionality—may be entirely consistent with the wishes of Congress. Nevertheless, a rule requiring direct appeal under 28 U.S.C. 1252 whenever the holding of unconstitutionality is a " 'predicate to the relief' " (Resp. Br. 11) would entail immediate review in this Court even in cases where respect for the actions of a coordinate branch of government would not demand it.

Still a third example, similar in many ways to this case, is suggested by *Wright* v. *Califano*, 603 F.2d 666 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980). There the question was whether the district court properly awarded retroactive monetary relief to plaintiffs claiming husband's insurance benefits under Section 202(c) of the Social Security Act (42 U.S.C. 402(c)), which the government acknowledged was unconstitutional. Not only did the government appeal that question to the court of appeals, but shortly after the appeal was docketed Congress actually repealed the invalid statute (though it did not resolve the question of retroactive relief). Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 *et seq.* Under respondent's interpretation of 28 U.S.C. 1252, the government would apparently have been required to appeal the issue of relief to this Court even if the statute had been repealed before the appeal was taken.

Indeed, respondent's argument that relief is an "intrinsic aspect" of the holding of unconstitutional-

ity (Br. 10) would require a direct appeal even by a plaintiff who prevailed on the constitutional issue and who therefore *could not* litigate it on appeal. Suppose, for example, that respondent had brought this suit as an individual action and that the district court—after holding Section 211(a)(5)(A) unconstitutional—had recomputed her earnings and held that she was entitled to receive $200 per month. Under respondent's theory that relief is intrinsically part of the constitutional issue, she would be entitled to take to this Court a claim that she was instead entitled to $205 per month. On that appeal she could not present as an issue the constitutionality of the statute, having prevailed on it below. It is hard to believe that Congress intended to require that this Court resolve the only remaining issue in dispute.

2. Respondent also argues (Br. 19-20) that even if the issue of relief is not a part of the constitutional question, direct appeal under 28 U.S.C. 1252 is still proper because Congress was concerned with the "broader problem [of] * * * the impact on federal officials and the programs under their administration." [7] It is unlikely, however, that Congress intended the right of direct appeal to turn on something as indefinite as a decision's "impact" on federal officials and programs where there is no live issue of constitutionality. Congress has not, for ex-

[7] Respondent's brief does not make clear whether this "impact" theory is intended as an alternative to the "intrinsic aspect" theory, or whether it is designed to explain why the "intrinsic aspect" theory makes sense. The discussion at Resp. Br. 19-20 suggests the former, and our treatment of it here assumes that that is so. What we say about it, however, demonstrates as well that the "impact" of relief is a fact too subjective and variable to support respondent's first argument either.

ample, expressed any similar intent for cases involving important issues of statutory construction that may have at least as great an impact on the implementation of the Social Security Act as the decision here. See, *e.g.*, *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983) (use of medical-vocational guidelines to determine a claimant's right to disability benefits); *Califano* v. *Yamasaki*, 442 U.S. 682 (1979) (right to oral hearing before recoupment of overpayments); *Heckler* v. *Day*, cert. granted, No. 82-1371 (Apr. 25, 1983) (time limits for administrative adjudication of disability claims).

Moreover, as we noted above (page 5), there is a clear difference between the impact of a holding of unconstitutionality, and the impact of choosing *X* rather than *Y* as a remedy for a conceded defect in a statute. The former decision necessarily frustrates the will of Congress expressed in the terms of the act. The latter choice, by contrast, may be precisely the one Congress would prefer, given the uncontested predicate of invalidity.

In any event, the very impracticality of an "impact" test for determining appellate jurisdiction shows the unlikelihood that Congress incorporated such a notion into Section 1252. Respondent concedes, for example (Br. 17), that the issue in *Montana Contractors' Ass'n* v. *Kreps*, 442 U.S. 935 (1979), could only be appealed under 28 U.S.C. 1291. The question there was whether the district court erred in not permitting the plaintiffs to seek damages against the federal and local officials responsible for administering the provision held to be unconstitutional. 78-1546 J.S. 4, 9-13, 12a (1978 Term). But whether an award of damages against those who administer a law has a lesser "impact on federal officials and * * * programs" (Resp.

Br. 20) than an order about how such officials should administer the law in future cases is not easily determined. In large part the answer may turn not on the legal or equitable nature of the relief but on the size of the plaintiff class.[8] Thus, if respondent had brought this action simply as an individual, an appeal contesting the relief awarded her would have been a matter of relative insignificance. Had the class certified included only those similarly situated in the State of California, federal courts elsewhere may have accepted the Secretary's contention that a different remedy was appropriate. In short, the "impact" of the remedy chosen varies in ways completely independent of the holding of unconstitutionality;[9] and allowing

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[8] Respondent argues that the difference between this case and *Montana Contractors' Ass'n* may not be the nature of the relief requested, but the fact that there "the plaintiffs sought to appeal * * * from the decision of the district court on a procedural matter" (Br. 17). But the question of class certification, like the denial of a motion to amend a complaint, may be characterized as "not part of the results of the court's holding that a federal statute [is] unconstitutional" (*ibid.*). As the discussion in text illustrates, however, both may bear directly on the "impact" of a district court's holding of unconstitutionality.

[9] In addition to the size of the plaintiff class and the legal or equitable nature of the relief sought, the "impact" of a remedial decision will depend on the character of the law held unconstitutional. For example, there are cases involving government benefit programs where the relief calls not for increased spending, but for division of a fixed amount among a larger beneficiary class. See *Richardson* v. *Griffin*, 409 U.S. 1069 (1972); *Richardson* v. *Davis*, 409 U.S. 1069 (1972); *Weber* v. *Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972). In other cases, an adverse decision on the constitutional issue may concern only the application of the statute to particular facts, not its validity as a whole. See *Fleming* v. *Rhodes*, 331

the right of direct appeal to turn on a necessarily subjective assessment of the nature of the impact will introduce considerable uncertainty into the question of jurisdiction.

3. Respondent notes that allowing the right of direct appeal to turn on whether the issue of constitutionality is contested will "provide a mechanism for appellate forum-shopping[:] * * * the proper appellate tribunal [will] be determined by decision of the appellant as to what issues should be argued" (Br. 22). But that is hardly a feature that makes 28 U.S.C. 1252 unique among statutes defining this Court's appellate jurisdiction. For example, the right to appeal under 28 U.S.C. 1257(1) and (2) turns on the issues the appellant has "drawn in question" in the highest state court. See *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 650-651 (1942) ("appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal"). And where the state court decides both federal and state issues, the losing party may seek review in this Court by contesting the former, but not the latter. *Zorach* v. *Clauson*, 343 U.S. 306, 311 n.7 (1952).

In fact Congress frequently makes the aggrieved party's choice of forum turn on the subject matter of his contention, both on appeal [10] and as an original

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U.S. 100 (1947). The question of relief in the latter case would be a matter of limited importance; in the former case the "impact" would be borne by private individuals rather than by the federal treasury.

[10] See 28 U.S.C. 1295(a) (jurisdiction of the United States Court of Appeals for the Federal Circuit); 12 U.S.C. 1904 note (jurisdiction of the Temporary Emergency Court of Appeals); *Spinetti* v. *Atlantic Richfield Co.*, 522 F.2d 1401

matter.[11] That method of apportioning jurisdiction—far from being objectionable as respondent believes—is a sensible way of dividing the federal judicial workload according to the expertise of the courts, the importance of the issues, the relative need for prompt decision of some questions, and the disproportionate burdens borne by some tribunals.[12]

(Temp. Emer. Ct. App. 1975) (antitrust, contract, and fair trade claims appealable to court of appeals, not TECA); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 185-186 (2d Cir. 1979) (issue jurisdiction of TECA). See also *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975) (appeal from three-judge court convened under 28 U.S.C. 1253 must be taken to court of appeals when injunction is denied on the basis of *Younger* v. *Harris*, 401 U.S. 37 (1971)); *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90 (1974) (same, when complaint is dismissed for lack of standing).

[11] See 28 U.S.C. 1333, 1334 (federal, not state, courts to hear admiralty and bankruptcy matters), 1491 (Claims Court to hear contract but not tort actions); 2 U.S.C. 437h (issues of constitutionality of Federal Election Campaign Act to be decided in first instance by court of appeals); 42 U.S.C. 1971(g) (three-judge district court to hear voting rights cases).

[12] Respondent suggests that making the choice of court turn on the issues raised will introduce uncertainty into the question of jurisdiction, since "the propriety of the * * * appeal could not be determined until briefs were filed" (Br. 22 n.17). It is true that the existence of jurisdiction will not be revealed by the notice of appeal to the court of appeals or to this Court. The same is true of notices of appeal under 28 U.S.C. 1254(2) and 1257(1) and (2): they do not disclose whether this Court's jurisdiction has been properly invoked. But that is irrelevant since a notice of appeal calls for no response, and the appellee *can* move to dismiss as soon as the issues are defined. At that point the existence of jurisdiction under 28 U.S.C. 1252 turns on a very simple rule: the appellant cannot appeal the holding of unconstitutionality to the court of appeals, and can only appeal to this Court when it contests that holding.

Respondent's discussion of "forum-shopping" implies that the government will somehow benefit from the ability to choose a more favorable court for presenting its claim on appeal. But unlike the situations to which that description is usually attached, see *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 73-74 (1938), this is not an area where the government can present identical claims to either of two courts in the hope of better treatment. On the contrary, the government must pay a heavy price in order to obtain review in the court of appeals: it must acquiesce in the holding that an act of Congress is unconstitutional. It is difficult to believe that the choice among courts would be a matter of game-playing when one of the two options entails such a sacrifice.

Respondent argues, however, that adoption of the Secretary's intepretation will allow an appellant to secure direct review in this Court "[e]ven if [his] constitutional argument is frivolous or insubstantial" (Br. 21), or worse, even where it has been rejected by this Court on an earlier appeal in the same case (Br. 22-23). This contention is itself frivolous. The solution respondent proposes to avoid the *possibility* that such appeals may be taken to this Court is to *require* that the appellant do so. The construction we have advanced, by contrast, is designed to carry out Congress's intent that this Court not have to review the very kinds of cases respondent describes (Gov't Br. 20-22).

4. Respondent relies on *Regan* v. *Taxation With Representation*, Nos. 81-2338 & 82-134 (May 23, 1983), for the proposition that "a ruling by the district court *upholding* the constitutionality of the challenged statute" is appealable under Section 1252 (Br.

14) (emphasis in original), and draws from this the conclusion that the ruling on relief here is similarly appealable. This Court also summarily affirmed another recent case, not cited by respondent, in which two of the appellants challenged the court of appeals' ruling on severability, but not its holding that the legislative veto provision in the Natural Gas Policy Act was unconstitutional. *Process Gas Consumers Group* v. *Consumers Energy Council of America*, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 & 82-209 (July 6, 1983). These cases are not dispositive of the issue here.[13]

In the first place, insofar as the cross-appeal in *Regan* simply raised an alternative ground for holding the statute unconstitutional, this Court could have considered the issue even if no cross-appeal had been taken. *United States* v. *Raines*, 362 U.S. 17, 27 n.7

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[13] Respondent also finds support for her position in *Califano* v. *Westcott*, *supra*, and *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975). Resp. Br. 12, 15. Neither of those cases is apposite. In *Westcott* the Commissioner's appeal on the issue of relief (No. 78-689) was properly before this Court only because the Secretary had already filed an appeal (No. 78-437) challenging the district court's holding that the statute was unconstitutional. 443 U.S. at 78-79, 83. Section 1252 explicitly provides that "[a] party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court."

Respondent states that "no constitutional issue was before the Court" in *McLucas* (Br. 15). But the district court had held unconstitutional Article 134 of the Uniform Code of Military Justice (421 U.S. at 30-31), the Secretary appealed from that holding (73-1346 J.S. 10-11), and this Court vacated the judgment and directed dismissal of the complaint because it concluded that Article 134 was clearly constitutional (421 U.S. at 32).

(1960).[14] More importantly, however, in both *Regan* and *Process Gas* a separate appeal had been taken from the court of appeals' ruling that the statute was unconstitutional.[15] Thus, except for the fact that both cases came from the court of appeals, those cases were similar to one in which the government appeals from a district court's holding of unconstitutionality, and the plaintiff cross-appeals from the court's failure to award all the relief he requested.[16] Cf. *Selective Serv-*

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[14] The cross-appeal in *Regan* (No. 82-134) did, however, seek relief beyond what was given to the cross-appellant by the court of appeals. The court of appeals had remanded to the district court for further proceedings to determine the appropriate remedy. *Taxation With Representation* v. *Regan*, 676 F.2d 715, 744 (D.C. Cir. 1982). The cross-appellant asked this Court to extend the right to lobby to all charities. 82-134 J.S. 6-9.

[15] The constitutional issue was raised in *Process Gas* by the appeals in Nos. 81-2020 and 81-2171, and in *Regan* by the government's main appeal in No. 81-2338.

[16] The issue of severability presented by the cross-appellants in *Process Gas*, like the issue of relief in this case and *Regan*, is not part of the lower court's constitutional holding, but rather a determination about how Congress would wish the statute to be enforced, given the unconstitutionality of one portion. *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 10-11; *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924) (severability is a "question of interpretation and of legislative intent. * * * The task * * * [is to] determin[e] the intention of the * * * legislature."). Because that is so, we have argued in *Heckler* v. *Mathews*, *supra*, that Congress may quite properly determine the issue of severability in advance, by including directions in the statute. 82-1050 Br. 43-51. Moreover, as is true with other questions of relief, see page 4, *supra*, this Court has left to the states the decision about severability of partially invalid state laws. *Olsen* v. *Smith*, 195 U.S. 332 (1904); *King* v. *West*

ice System v. *Minnesota Public Interest Research Group, Inc.*, appeals pending, Nos. 83-276 & 83-637 (docketed Aug. 19 & Sept. 30, 1983); *McLucas* v. *DeChamplain*, 421 U.S. 21, 29 n.10 (1975) ("There is no question that our appellate jurisdiction as to the access issue depends entirely on whether an appeal properly lies as to the [constitutional] issue."). Section 1252 explicitly provides that such related non-constitutional issues may be brought to this Court from a district court, once an appeal is taken on the constitutional question. *Regan* and *Process Gas* hold only that the same is true of cross-appeals from the courts of appeals.[17] The latter result, though not nec-

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Virginia, 216 U.S. 92 (1910); cf. *New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976) (severability is "only a state-law question").

In *EEOC* v. *Allstate Insurance Co.*, No. J82-0186(B) (S.D. Miss. Sept. 9, 1983), the district court held unconstitutional the legislative veto provision in the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 *et seq.* Concluding that that provision was not severable from the remainder of the Act, the court then found that Reorganization Plan No. 1 did not effectively give the EEOC authority to enforce the Equal Pay Act, and dismissed the EEOC's suit under that Act against Allstate. The Solicitor General, conceding the unconstitutionality of the legislative veto provision, has recently authorized an appeal to the Eleventh Circuit on the question of severability. Because of the confusion caused by respondent's position in this case, the Solicitor General has also authorized the filing of a protective appeal on that issue to this Court under 28 U.S.C. 1252.

[17] This Court in *Regan* found authority for such cross-appeals in the first paragraph of 28 U.S.C. 1252. Slip op. 2-3 n.3 (" '*Any party* may appeal' "). We suggested in our opening brief that the more appropriate source of authority would be the second paragraph, which expressly addresses the question of cross-appeals (Br. 34 n.24). Wherever the authority

essary "to avoid splitting the case" between appellate courts, see R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978), is consistent with the "desire of Congress" that this Court view the constitutional question in the context of "the whole case." *United States* v. *Raines*, 362 U.S. at 27 n.7.

This case, in contrast to *Regan* and *Process Gas*, concerns jurisdiction over a direct appeal, not a cross-appeal, and it raises no issue concerning the constitutionality of a federal statute. Whatever reason might justify Section 1252's grant of ancillary jurisdiction over cross-appeals simply does not exist in such a case.

5. It bears repeating that the issue here is not whether the relief ordered by the district court can be reviewed in this Court. That option is always available by means of certiorari to the court of appeals under 28 U.S.C. 1254(1), which we assume this Court would grant in those cases where the question is substantial enough to warrant further review. The issue is rather whether this Court must immediately accept for plenary consideration the potpourri of nonconstitutional issues that can accompany a holding that an act of Congress is unconstitutional, in cases where neither the government nor any other party contests the latter holding. Many of those nonconstitutional issues will be matters of little consequence; none of them will warrant the immediate and final review by this Court that Congress desired for orders invalidating its legislative efforts. We cannot

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may be found, however, the right of cross-appeal conferred by Section 1252 presupposes that it will be presented to this Court along with the constitutional question, which after all is the reason why direct appeals are permitted in the first place.

believe that 28 U.S.C. 1252 requires such an unwise expenditure of this Court's time and energies.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to the court of appeals for consideration of the Secretary's appeal. If the Court concludes that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291, however, the Court should vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal may be taken to this Court pursuant to 28 U.S.C. 1252.[18]

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

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[18] Respondent has suggested that "[v]acating the district court's final judgment [in order to permit the entry of a new judgment from which a direct appeal can be taken] is likely to cause confusion as to the government's obligation to continue paying * * * benefits * * * to the class members" (Br. 24 n.18). That prospect is unlikely, since any new judgment can be entered in precisely the same terms as the original one.

APPENDIX

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

September 30, 1980

The Honorable Thomas P. O'Neill, Jr.
The Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I wish to inform the House of Representatives that the Solicitor General has determined that the United States will not appeal the judgment of the district court in *Becker* v. *Harris* (E.D. Cal., Civil No. S-79-248-LKK). In this case, the court held that Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. 411(a)(5)(A), violates the equal protection requirement of the Fifth Amendment to the Constitution. Section 211(a)(5)(A) provides that all income derived from a trade or business that is classified as "community income" under state community property laws shall be credited to the husband for social security purposes unless "the wife exercises substantially all of the management and control of such trade or business." The result of this provision is that many women who participate in the management of a family-owned business are severely disadvantaged in their ability to earn sufficient quarters of coverage to achieve insured status under the Act.

The Supreme Court has established that a gender-based classification will be upheld only if it is substantially related to the achievement of important

governmental objectives. Other provisions of the Social Security Act have been invalidated in the past for failure to meet this test. See, *e.g.*, *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). After careful consideration, we have concluded that no justification can be advanced for the gender-based classification invalidated in this case that would satisfy this constitutional requirement. Accordingly, an appeal to the Supreme Court would serve no useful purpose.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the gender-based discrimination at issue.

If the Department can be of further assistance to you in explicating the reasons for our decision or if you or your staff believe it would be helpful to discuss the options that the House of Representatives may wish to pursue, Deputy Solicitor General Kenneth S. Geller will be pleased to discuss the matter further. He can be reached at 633-4037.

Sincerely,

/s/ Benjamin R. Civiletti
BENJAMIN R. CIVILETTI
Attorney General

[A virtually identical letter was sent to Vice President Walter F. Mondale, as President of the Senate]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 426054 157

No. 82-874-CFX
Status: GRANTED

Title: Margaret M. Heckler, Secretary of Health and Human Services, Petitioner
v.
Milored M. Edwards, etc.

Docketed:
November 24, 1982

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Dudovitz, Neal S.

Entry	Date	Note	Proceedings and Orders
1	Oct 15 1982		Application for extension of time to file petition and order granting same until November 24, 1982 (Rehnquist, October 19, 1982).
2	Nov 24 1982	G	Petition for writ of certiorari filed.
4	Dec 13 1982		Order extending time to file response to petition until January 24, 1983.
5	Jan 26 1983		DISTRIBUTED. February 18, 1983
6	Jan 27 1983	G	Motion of Mildred M. Edwards for leave to proceed in forma pauperis filed.
7	Jan 27 1983		Brief of respondent Mildred M. Edwards, etc. in opposition filed.
8	Feb 2 1983		DISTRIBUTED. February 18, 1983. Motion of Mildred M. Edwards for leave to proceed in forma pauperis.
9	Feb 16 1983	X	Reply brief of petitioner filed.
10	Feb 22 1983		Motion of Mildred M. Edwards for leave to proceed in forma pauperis GRANTED.
11	Feb 22 1983		Petition GRANTED.
			**********
13	Apr 8 1983		Order extending time to file brief of petitioner on the merits until May 9, 1983.
16	May 18 1983	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
17	May 23 1983		DISTRIBUTED. May 26, 1983. (Above motion).
18	May 31 1983		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
20	May 9 1983		Order further extending time to file brief of petitioner on the merits until May 31, 1983.
21	Jun 1 1983		Order further extending time to file brief of petitioner on the merits until June 14, 1983.
22	Jun 14 1983		Brief of petitioner filed.
24	Jul 5 1983		Order extending time to file brief of respondent on the merits until August 20, 1983.
25	Aug 19 1983		Brief of respondent Mildred M. Edwards, etc. filed.
27	Oct 18 1983		CIRCULATED.
28	Oct 24 1983		SET FOR ARGUMENT. Wednesday, November 30, 1983. (2nd case) (1 hour)
29	Nov 3 1983		Record filed.
30	Nov 3 1983		Certified original record (80X) received.
31	Nov 23 1983	X	Reply brief of petitioner Heckler, Sec. H&H Serv. filed.
32	Nov 30 1983		ARGUED.